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73-263 Cons.  
73-344 Cases

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 2nd day of December, in the year of our Lord  
one thousand nine hundred and seventy-four, within and for  
the Second District of Illinois:

Present -- Honorable EDWARD C. EBERSPACHER, Justice  
Honorable CASWELL J. CREBS, Justice  
Honorable J. WALDO ACKERMAN, Justice  
LOREN J. STROTZ, Clerk  
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On July 9, 1975 the Opinion of the Court was filed  
in the Clerk's office of said Court, in the words and figures  
following, viz:



Admitted

FILED

JUL 9 - 1975

LOREN J. STROTZ, Clerk  
Appellate Court, 2nd District

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee )  
 )  
v. )  
 )  
DENNIS M. MCMAHON, )  
 )  
Defendant-Appellant )

Appeal from the  
Circuit Court  
of the 18th  
Judicial Circuit,  
DuPage County,  
Illinois

MR. JUSTICE J. WALDO ACKERMAN Delivered the opinion of  
the court:



Mr. Justice Ackerman delivered the opinion of the Court.

This is an appeal from a conviction of the offense of reckless homicide after a bench trial in the Circuit Court of DuPage County for which the defendant was sentenced to two years probation and fined \$1,000. No question of pleading is raised by the appeal.

On May 5, 1971 at approximately 8:30 P.M. the defendant was involved in an automobile collision at 22nd Street and Findley Road, Lombard, Illinois in which Lillian G. Hunter was injured and allegedly died of those injuries.

Following the accident the victim was removed from the wreckage and transported by ambulance to the Elmhurst Hospital. Her son, Donald Hunter, was notified and came to the hospital at about 10:30 P.M., at which time he was told his mother was dead. Her personal effects were given to him.

The cars involved in the accident were identified, a police officer took a purse from the victim's car and noted that the driver's license bore the name of Lillian G. Hunter. Later at the hospital the ambulance driver noted that the name of the party he transported was Lillian G. Hunter. The ambulance driver saw the doctor on duty examine the victim. This doctor later testified that although he did not actually recall the person, he did fill out a report dated May 5, 1971 as a matter of hospital routine and that it contained his handwriting and signature. The report concerned Lillian G. Hunter. A nurse on duty testified likewise. She also testified as to the manner in which a person who is dead on arrival





Another doctor testified he performed an autopsy on a person tagged as Lillian G. Hunter. He testified that she had certain crushing injuries to the chest on the left side of her body of the type which would be caused by the accident described in a hypothetical set of facts. He further testified that these injuries were the cause of death. This doctor examined one other female cadaver on the same day but testified that this cadaver did not display similar injuries.

After trial without a jury, the defendant was found guilty and sentenced.

The issues presented are:

Is the offense of reckless homicide constitutionally invalid because it denies equal protection and due process;

Were there critical deficiencies in the evidence pertaining to the identity of the victim and the cause of death;

Was incompetent hearsay evidence admitted, and if so did it deprive the defendant of a fair trial and his constitutional right to confrontation.

Appellant claims there is not sufficient proof of connection between the cadaver which the doctor autopsied and the victim named in the indictment. He claims that there is no evidence showing a continuous and unbroken chain of possession of the body of the woman injured at the time and place stated. The record does not support this contention. In the only case cited by appellant, People v. Rettig, 131 Ill.App.2d 687 (aff. 50 Ill.2d 317), the court held that testimony supplied by the sheriff, the sheriff's chief investigator, and a pathologist was



that "The general rule is that the identity of the victim as charged in the indictment is one of the elements of the offense which must be proved by the State," it also stated "Testimony based on hearsay is not incompetent..." and "...where motive and consequently mental state may depend directly on the identity of the victim and his relationship to the defendant, the issue may be crucial and more persuasive proof is required." (At 690.) / In the instant case motive was not involved. Also, the court said, speaking of the requirement that the identity be proved by the state, "Such a requirement enables the defendant to prepare his defense..." (At 690.) / The record in this case does not indicate that there was so much doubt about the identity of the victim that the defendant was not able to properly prepare and present his case.

Appellant also contends that incompetent hearsay evidence was admitted and that it was prejudicial to him. The item complained of was the medical report signed by the doctor on duty when the victim was received at the hospital and containing both his writing and the writing of the duty nurse. It was at first refused as hearsay by the trial judge, then reoffered and after argument admitted as past recollection recorded. This was objected to as was also the admission of testimony from the ambulance driver communicating the identity of the woman to the doctor on duty when the victim arrived. It would seem that such medical records and the testimony of the persons at the scene who there discovered the identity of the person would be a usual way of establishing identity, and when confirmed later, as it was in this case, should not be rejected as hearsay.



The only case cited by appellant in support of this contention, People v. Fiddler, 45 Ill.2d 181, is not in point because in Fiddler the only direct evidence of the cause of death was a certified copy of the coroner's certificate of death issued by the county clerk. The Court correctly concluded that the inclusion of a statement regarding the cause of death on a coroner's certificate of death is not one of the facts which the law requires the coroner to include on such a certificate and therefore had no probative value. In the instant case there was an autopsy by a physician and his testimony was competent to establish the cause of death.

Appellant maintains that it is a denial of equal protection and due process to prosecute him under the reckless homicide paragraph of section 9-3 of the Criminal Code (Ill.Rev.St. 1971, Ch. 38, sec. 9-3(b) ) because the offense is not defined, and since it constitutes a misdemeanor gives the state's attorney and grand jury, and in some instances also the court and petit jury, an unrestricted choice in determining the offense to be charged and the sentence to be imposed. Appellant argues that such uncertainty invalidates the provision.

Appellant relies primarily on People v. McCullough, 8 Ill.App.3d 963, in which the Fourth District Appellate Court held this provision unconstitutional. Since the briefs were filed in this case, the Illinois Supreme Court, in People v. McCullough, 57 Ill.2d 440, reversed the Appellate Court case relied upon by appellant. The Supreme Court opinion last mentioned disposes of the constitutional issue in this case.



For these reasons, the judgment of the Circuit Court of DuPage County is affirmed.

AFFIRMED.

CREBS and EBERSPACHER, J.J., CONCUR

PUBLISH ABSTRACT ONLY





## UNITED STATES OF AMERICA

State of Illinois       )  
Appellate Court       ) ss:  
Second District       )

At a session of the Appellate Court, begun and held  
at Elgin, on the 2nd day of December, in the year of our Lord  
one thousand nine hundred and seventy-four, within and for  
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
          Honorable WILLIAM L. GUILD, Justice  
          Honorable ALBERT E. HALLETT, Justice  
          LOREN J. STROTZ, Clerk  
          WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On       July 21, 1975               the Opinion of the Court was filed  
in the Clerk's office of said Court, in the words and figures  
following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND JUDICIAL DISTRICT  
FIRST DIVISION

---

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee, .	)	THE SIXTEENTH
	)	JUDICIAL CIRCUIT,
v.	)	DEKALB COUNTY,
	)	ILLINOIS.
THOMAS E. MILLIGAN,	)	
	)	
Defendant-Appellant.	)	

---

Mr. JUSTICE HALLETT delivered the opinion of the court:

Pursuant to plea negotiations, the defendant, Thomas E. Milligan, entered a plea of guilty to the offense of misdemeanor theft. Subsequently, the trial court sentenced the defendant to serve 364 days at the State Penal Farm and imposed a \$1000 fine. On appeal, the defendant contends that the State's Attorney failed to fulfill the plea agreement, whereby the prosecutor agreed to recommend probation for a two year period. Having reviewed the record, we conclude that the State's Attorney fulfilled the plea agreement, and we therefore affirm the judgment.

The defendant was charged in three separate indictments with three counts of burglary and three counts of misdemeanor theft. At the hearing on October 31, 1974, the State's Attorney informed the court that pursuant to plea negotiations, the State agreed to nolle prosequere all charges except one count of misdemeanor theft, to which the defendant agreed to plead guilty. In addition, the court was informed that the State agreed to recommend a two year term of probation.

Thereafter, the court admonished the defendant pursuant to Supreme Court Rule 402(a) and ascertained that the

defendant understood each admonition. The court in no manner whatsoever indicated concurrence or conditional concurrence with the plea agreement. Rather, in addressing the defendant the trial judge stated:

"[Y]ou understand, even though there have been negotiations between your counsel and the State's Attorney, that the Court isn't bound by those recommendations\* \* \*?"

The defendant responded that he understood that fact. The court then ordered a presentence investigation, and repeatedly asked the defendant if he nonetheless desired to persist in his plea of guilty. In response, the defendant asserted that he wished to plead guilty.

At the hearing on November 22, 1974, defense counsel stated that he had explained to the defendant that the court had not concurred with the State's recommendation of probation and that the probation officer had not recommended probation in the presentence report. The State's Attorney declined to present any matters in aggravation, but rather asserted that the State had recommended two years' probation. In response to the court's inquiry, the defendant indicated that he persisted in his plea of guilty. The trial judge stated:

"Mr. State's Attorney, did I not make it clear that I am not bound with any agreement you had with any defense counsel?\* \* \* But you can't put handcuffs on the Court, \* \* \*" I did not agree to it, did I?"

Immediately thereafter, the court again inquired if the defendant desired to plead guilty, and the defendant responded affirmatively. The court then asked the defendant if he wished to change his plea to not guilty, and the defendant responded that he did not. After the court was informed of the minimum and maximum penalty prescribed by law for the offense of mis-

demeanor theft and after the court reviewed the presentence report, the court stated:

"Your application for probation is denied. What is your recommendation as to sentence?"

The State's Attorney replied, "I leave it up to your Honor's discretion, your Honor." Then, the court sentenced the defendant to serve 364 days at the State Penal Farm and imposed a \$1000 fine.

On appeal, the defendant contends that the State's Attorney failed to fulfill his part of the plea agreement, and that consequently, his plea of guilty was not voluntary. The defendant argues that the State's Attorney was obligated by the plea agreement to recommend probation and to persist in this recommendation, even after the trial judge denied the defendant's petition for probation.

It is well established that a plea of guilty made in reliance on an unfulfilled promise of the prosecutor is not voluntarily made by the defendant. (People v. Pier (1972), 51 Ill. 2d 96, 99, 381 N. E. 2d 289.) However, the record in the case at bar fails to substantiate the contention that the prosecutor failed to fulfill his promise. Rather, the State's Attorney explicitly informed the court that there was a plea agreement and explicitly informed the court of the terms of the agreement. Moreover, defense counsel acknowledged at the hearing on November 22, 1974, that the State had already recommended two years probation. Indeed, the record clearly demonstrates that the State's Attorney recommended probation at several times during the proceedings.

Furthermore, we note that the trial judge made no misrepresentations that he was in agreement with or bound by the State's Attorney's recommendation. Rather, in compliance

with Supreme Court Rule 402(d)(3), the trial court on numerous occasions informed the defendant that the court was not bound by the plea agreement and that if the defendant persisted in his plea, the disposition might be different from that contemplated by the plea agreement. (Ill. Rev. Stat. 1973, ch. 110A, par. 402(d)(3).) Throughout the proceedings, the court inquired of the defendant if he desired to persist in his plea of guilty. Thus, although the trial judge had indicated that he did not concur in the plea agreement, and had given the defendant numerous opportunities to withdraw his plea of guilty, the defendant persisted in his plea.

As the record discloses, the court then explicitly denied probation and asked the State's Attorney for a recommendation as to sentence. At this point in the proceeding, the judge clearly was requesting a recommendation as to sentence other than probation, which had been denied. Given the trial judge's denial of the State's recommendation for probation, the State's Attorney made no recommendation as to sentence, leaving the matter to the court's discretion. This does not constitute a failure of the prosecutor to fulfill his part of a plea agreement. At this point, it was futile to recommend probation since the State's recommendation of probation previously had been denied. Indeed, the State's Attorney was not obligated under the terms of the plea agreement to recommend probation when it was clear that the court was asking for a recommendation as to sentence other than probation. We believe that the State's Attorney acted properly in making no recommendation under these circumstances.

Furthermore, we note that defense counsel made no objection during the proceedings. Indeed, defense counsel

stated that he had informed his client that the court was not bound by the State's recommendation, and he stated that the State's Attorney had recommended two years probation, thereby acknowledging the prosecutor's fulfillment of the plea agreement. At no time did defense counsel indicate that the State had not fulfilled its part of the plea agreement. It is well established that an issue not presented in the trial court cannot be raised for the first time on direct appeal. People v. McAdrian (1972), 52 Ill. 2d 250, 253, 287 N. E. 2d 688; People v. Dickinson (1973), 13 Ill. App. 2d 469, 471, 472, 280 N. E. 2d 274.

We conclude that the prosecutor fulfilled his part of the plea agreement, that the trial court clearly indicated a lack of concurrence with the plea agreement, and that an adequate opportunity to withdraw his guilty plea was afforded the defendant. We therefore affirm the judgment.

AFFIRMED.

SEIDENFELD, P.J., and GUILD, J., concur.





## UNITED STATES OF AMERICA

State of Illinois     )  
Appellate Court     ) ss:  
Second District     )

At a session of the Appellate Court, begun and held  
at Elgin, on the 2nd day of December, in the year of our Lord  
one thousand nine hundred and seventy-four, within and for  
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable WILLIAM L. GUILD, Justice  
Honorable ALBERT E. HALLETT, Justice  
LOREN J. STROTZ, Clerk  
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On       July 15, 1975       the Opinion of the Court was filed  
in the Clerk's office of said Court, in the words and figures  
following, viz:



No. 74-132

**FILED**  
1st DIVISION

JUL 15 1975

LOREN J. STROTZ, Clerk  
Appellate Court, 2nd District

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FIRST DIVISION

**Abstract**

J. EDWARD JONES, Agent	)	
	)	
Plaintiff-Appellant,	)	
	)	Appeal from the Circuit
v.	)	Court for the Fifteenth
	)	Judicial Circuit,
WALTER KRUEGER and BETTY	)	Stephenson County,
KRUEGER,	)	Illinois.
	)	
Defendants-Appellees.	)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

On July 31, 1972 plaintiff obtained a default judgment in the amount of \$1,580 for rents allegedly owed by defendant. On December 10, 1973, defendants filed a motion to vacate the judgment. Plaintiff's motion to dismiss defendants' motion to vacate, alleging that the facts of the case did not warrant the application of Section 72 of the Civil Practice Act (Ill.Rev.Stat. 1971, ch. 110A, par. 72), was denied. Defendants' motion to vacate the judgment was granted and plaintiff appeals. Defendants have not responded in this court either by appearance or by filing a brief.

Plaintiff contends that it is clear from the record that defendants had notice of the trial, that they stated no excuse for not appearing at that time and stated no meritorious defense. Plaintiff argues that the trial court improperly granted Section 72 relief upon allegations which do not relate to the entry of the

default judgment but which state that the judgment was not directly appealed after its entry because plaintiff misled them into disregarding their right to appeal.

Since defendants have not filed briefs as required under Supreme Court Rules 341, 343(a) (Ill.Rev.Stat. 1973, ch. 110A, pars 341, 343(a)), or have not appeared to support the judgment in their favor and do not oppose the prayer for reversal, we find, in the exercise of our discretion, that the circumstances do not call upon us to rule on the merits to prevent injustice. (King v. King (1974), 24 Ill.App.3d 222; Budget Rent-A-Car v. Kirk (1974), 19 Ill.App.3d 576 (Abst.).) We summarily reverse the judgment which vacated the default and reinstate the judgment in favor of the plaintiff.

Reversed.

GUILD and HALLETT, J.J., concur.

## STATE OF ILLINOIS



75-22

John J. Potter

APPELLATE COURT

THIRD DISTRICT

vs.

OTTAWA

John Brewer, Forest P. Whitlow and  
Joseph Delfino, individually and  
Royal National Investment and Mortgage  
Corporation

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-five within and for the Third District  
of Illinois:

Present— PC

HON. ALLAN L. STOUDEER, Presiding Justice

HON. JAY J. ALLOY, Justice

HON. TOBIAS BARRY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE-IT REMEMBERED, that afterwards on  
July 18, 1975 the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:



In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1975.

JOHN J. POTTER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Bureau County
	)	
vs.	)	
	)	Honorable
JOHN BREWER, FOREST P. WHITLOW and	)	C. Howard Wampler
JOSEPH DELFINO, individually and	)	Presiding Judge
ROYAL NATIONAL INVESTMENT AND MORTGAGE	)	
CORPORATION,	)	
	)	
Defendants-Appellants.	)	

PER CURIAM

Abstract

This is an appeal from a judgment of the Circuit Court of Bureau County entered by default in the amount of \$10,000 plus interest in the amount of \$802.08, together with attorney's fees in the sum of \$2,500 and costs of suit, as against defendants and in favor of plaintiff, John J. Potter. Plaintiff brought a statutory action under the Illinois "Blue Sky" Laws (ch. 121½, §137.13, 1973 Ill. Rev. Stat.). The action was instituted to set aside or void the purchase of \$10,000 worth of securities by plaintiff from defendants.

The three individual defendants were served with summons on September 6, 1974. It required them to appear in court on September 19. Defendant Brewer was served again in his capacity as agent for the defendant corporation, Royal National Investment and Mortgage Corporation, on either September 13 or September 16. When no appearance was made on behalf of any defendant in the court on the return day of September 19 specified in the summons, the court entered a default judgment in favor of plaintiff and as against all defendants as we have indicated.





On October 4, 1974, 28 days after the first service of summons on defendants, and only 17 days after service on the corporation, defendants filed a joint motion to dismiss the complaint. Apparently, after the defendants discovered that a default judgment had been entered, they filed a supplement to the motion to dismiss by a motion to set aside the default judgment on the ground that it was prematurely entered, since a responsive motion to the complaint had been made within 30 days of the service on any of the defendants. It was asserted in the motion to set aside the default judgment that defendants had relied upon the normal 30-day period for answering a complaint and particularly had done so in the instant case because of the nature of the action for rescission. The trial court, however, denied the motion to set aside the default judgment.

Supreme Court Rule 101 (Ill. Rev. Stat., 1973, ch. 110A, §101) provides for two types of summons. One is a "specified-date" summons and the other is the normal 30-day summons. The "specified-date" summons may be used "in an action for money not in excess of \$10,000 exclusive of interest and costs." Under Rule 101(b)(1), a defendant can be required to make his appearance on a particular date which must be not less than 21 nor more than 40 days from the date of the issuance of the summons. Service may be made as late as 3 days prior to date specified for appearance as required by statute or rules of court. It is specified in Rule 101(d) that in all other cases a summons shall require each defendant to file his answer or to otherwise file his appearance within 30 days of service exclusive of the day of service.

It is also provided in Section 101(e) that the use of the wrong from of summons would not affect the jurisdiction of the court. The individual defendants in this cause were served with the specified-date type of summons 13 days before they were required to appear. The principal service on the corporation called for an appearance within 3 days. Defendants contend in this court that they were entitled



to a 30-day period to answer and that, despite being served with the specified-date form, they reasonably concluded that they were entitled to the 30-day period because of the nature of the action involved.

Under the facts and circumstances in the instant cause, we believe that the filing of the motion to dismiss, supplemented by the motion to set aside the default, was a sufficiently timely appearance by defendants under the circumstances. We conclude that it was an abuse of discretion for the court to deny the motion to set aside the default judgment in this cause because of a default entered in a short 3-day period following service of summons on the principal defendant, the corporation. Application of simple equities require that such judgment be set aside and defendants be given an opportunity to present their defense to the action.

It is argued by plaintiff that defendants have not alleged that they have a meritorious defense in the action, other than by filing of the motion to dismiss. In the posture of this cause, the showing of a meritorious defense was not an absolute prerequisite to setting aside the default judgment. Plaintiff's further contention (that once a default judgment is entered, even though improperly, it can only be set aside by a showing of a meritorious defense) cannot be sustained since to do so would permit unauthorized procedures to place a plaintiff in a position of preference or advantage to which he is not entitled under equitable principles. (See: e.g. People ex rel. Reid v. Adkins (1971) 48 Ill. 2d 406, 270 N.E.2d 841). There would be no unreasonable burden on plaintiff to require plaintiff to establish his claim in the trial court in this cause.

The order of the Circuit Court of Bureau County which denied defendant's motion to set aside the judgment is reversed and the default judgment is accordingly set aside. Cause is remanded to the Circuit Court of Bureau County for further proceedings in this action by the parties in this cause.

Reversed and Remanded.



3D  
30 I.A. 155

(24540-4M-9-70) 160-0



## STATE OF ILLINOIS

## APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE ALLAN L. STOUDEER, Presiding Judge

HONORABLE JAY J. ALLOY, Judge

HONORABLE RICHARD STENGEL, Judge

Attest: ROBERT L. CONN, Clerk.

---

BE IT REMEMBERED, that to-wit: On the 24th day  
of July A. D. 19 75, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:

1874

# REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION OF THE HOUSE OF REPRESENTATIVES, PASSED MARCH 10, 1874, RELATIVE TO THE LANDS BELONGING TO THE UNITED STATES.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1874.

THE LAND OFFICE, DEPARTMENT OF THE INTERIOR.

## STATE OF ILLINOIS

APPELLATE COURT

## FOURTH DISTRICT

General No. 12550.

Agenda No. 75-165

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee

VS .

LESTER GILBERT,

Defendant-Appellant

Appeal from  
Circuit Court  
Champaign County

Mr. JUSTICE ALLOY delivered the opinion of the Court:

Defendant Lester Gilbert was found guilty, in a jury trial, of four charges of burglary and sentenced to concurrent terms of 6-2/3 to 20 years in the penitentiary. He now appeals to this Court on the sole contention that the sentences are excessive.

It is shown by the record that defendant burglarized the high school in Fisher, Illinois, a few days before February 17, 1972. On the evening of February 17, 1972, he and two accomplices burglarized four schools in or near the Champaign-Urbana area. Gilbert's accomplices pleaded guilty to the burglary charges and agreed to testify against Gilbert in his jury trial.

Defendant was convicted on June 21, 1972, for the Fisher burglary and was later sentenced to a term of 5 to 15 years imprisonment. That conviction is not now before this Court. Several days later he was tried for the four burglaries which occurred on the night of February





17, 1972, and, principally as a result of the accomplices' testimony, defendant Gilbert was found guilty on all four counts on June 30, 1972. He applied for probation. The request was denied and defendant was sentenced to concurrent terms of 8 to 24 years in the penitentiary on each of the counts.

In an initial appeal, this Court ordered that the case be remanded so that the sentences could be modified to comport with the provisions of the new Unified Code of Corrections (Ill.Rev.Stat., 1973, ch. 38, ¶1001 et seq.). Under the Code of Corrections, burglary is classified as a Class 2 felony, and the maximum term of imprisonment is 20 years.

When defendant appeared in court for resentencing on January 22, 1974, the court appointed the Public Defender to represent him, because he was indigent. Gilbert and his new counsel conferred briefly, at which time both counsel and defendant told the court they were ready to proceed with the sentencing hearing. The record from the original probation hearing and sentencing hearing was introduced in evidence. From such record it was apparent that at the time of the original sentences in this case, defendant had been convicted and sentenced for the Fisher burglary and was also on parole for a 1969 forgery conviction. Defendant also had some misdemeanor convictions and a juvenile record. It was also noted that he had an unstable work record. Defendant was 22 years old and married, while the accomplices were 18 and 19 respectively. Defendant's accomplices, who pleaded guilty, had received probation. The testimony at the trial indicated that Gilbert had instigated the burglaries and provided the automobile.



The record also shows that a vocational rehabilitation counselor, a Mr. Demaree, had testified in the original sentencing hearing that he had counseled Gilbert and found him to be very cooperative at first, but saw him become discouraged as the months went by. The counselor thought that Gilbert was a skilled electrician and could not find a job. He was aware that Gilbert committed the burglaries during the period of counseling. Following the hearing, the trial court sentenced the defendant to the four concurrent terms of 6-2/3 to 20 years.

As we have noted, the maximum term of imprisonment for a Class 2 felony such as burglary is 20 years. The minimum term may not be greater than 1/3 of the maximum (Ill. Rev. Stat., 1973, ch. 38, ¶1005-8-1 (c)(3)). Defendant, therefore, received the highest possible sentence of imprisonment available for the crimes he committed, considered as separate sentences. Defendant contends that the imposition of such severe sentences was unjustified on the record and an abuse of the court's discretion.

The minimum sentence (as provided in ¶1005-8-1(c)(3)):

"\* \* \* shall be 1 year unless the court, having regard to the nature and circumstances of the offense and the history and character of defendant, sets a higher minimum term \* \* \* "

Defendant argues that he should not have received the highest possible minimum term, in view of the fact that the crime of burglary could have involved conduct considerably more severe than breaking and entering with intent to commit theft. (People v. Grigsby (4th Dist., 1966), 75 Ill. App. 2d 184, 194, 220 N.E. 2d 498). Defendant suggests that the higher minimum term should be reserved for crimes such as breaking and



entering with intent to commit rape or murder. The State contends that defendant's prior record can justify a higher minimum sentence as provided by the statute itself. (See: ¶1005-8-1 (c) (3)).

Defendant was on parole at the time he committed the four burglaries. He had two felony convictions (forgery and burglary) at the time of the original sentencing. He also had other misdemeanor convictions and a juvenile record. We note also that the co-defendants testified that Albert was the instigator of the burglaries and took the younger accomplices along with him. There were also four school burglaries undertaken at the instigation of defendant that night. The court apparently took all these factors into consideration in determining the sentence to impose.

It is true, as defendant points out, that since the four burglaries occurred in one evening, they do not show a pattern of criminal conduct, as might have been the case if they had been spread over a longer period of time. The commission of four separate burglaries in one night, however, combined with the fact that defendant had burglarized the other school several days earlier, and also had a prior forgery conviction, must have raised in the mind of the court that defendant's potential for rehabilitation was not such as to require a low minimum term. Under the terms of Article I, Section II of the 1970 Illinois Constitution, penalties are to be imposed with regard to the rehabilitative potential of a defendant and the seriousness of the offenses involved. The burglarizing of four public schools, by a twice-convicted felon and parolee, obviously was an offense of some seriousness and would justify a sentence above the minimum.



Defendant argues that his sentences are clearly excessive in light of the probation awarded to the accomplices. Under the law of this State, co-defendants may be given different sentences for the same offense, based on differences between the co-defendants, such as a prior criminal record and the role of each in the particular offense.

People v. Spears (1971), 50 Ill. 2d 14, 18, 276 N.E.2d 322; People v. Dickens (5th Dist., 1974), 19 Ill. App. 3d 419, 424, 311 N.E.2d 705.

The co-defendants did not have the extensive criminal record which Gilbert had. They were also younger and the evidence showed that Gilbert was the instigator of the burglaries. The differences readily support the granting of probation to the accomplices while defendant received the prison term referred to. Defendant also contends that the trial court had to make a finding under Section 1005-6-1 (a) (3) that probation would not deprecate the seriousness of the offense before he granted probation to the accomplices, and that because of such finding, defendant Gilbert should also have probation. While Section 1005-6-1 was not in effect in 1972 when defendant was sentenced, the issue of whether or not probation would deprecate the seriousness of the offense depends to some extent on the particular defendant, his character and his past record. Probation for a young, first offender might not deprecate the seriousness of the offense, since the young person may have been led astray by his older, more experienced companion. That companion, as a parolee and convicted felon, would be in a different position than the younger accomplice.

Basically, a reviewing court, in considering the question of reduction of sentence under Supreme Court Rule 615 (b)(4) (Ill. Rev. Stat. 1973, ch. 110A, ¶615 (b)(4)), should exercise that power with great caution since the trial judge is normally in superior position to





evaluate the circumstances and to impose the appropriate sentence. (People v. Allen (1974), 56 Ill. 2d 536, 547, 309 N.E.2d 544; People v. Taylor (1965), 33 Ill. 2d 417, 424, 211 N.E.2d 673). A sentence should not be modified unless it is greatly at variance with the purpose and spirit of the law or greatly disproportionate to the nature of the crime, provided it is within the statutory limits (People v. Wright (1974), 56 Ill. 2d 523, 536, 309 N.E.2d 537). On the basis of a review of the record we do not find that the trial court abused its discretion in imposing sentence. The issue is not whether we, sitting as trial judges, would have imposed a lesser sentence, but whether, in fact, the trial court abused its discretion in imposing the sentence. We do not find such abuse of discretion.

The judgment of the Circuit Court of Champaign County is, therefore, affirmed.

Affirmed.

Stouder, P. J. and Stengel, J. concur.



3D  
30 I.A. 270



No. 60588

MARCY F. FIELDS,	)	APPEAL FROM THE
A.K.A. MARCY F. GORDON,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
ROBERT FIELDS,	)	HONORABLE
	)	MARGARET G. O'MALLEY,
Defendant-Appellant.	)	PRESIDING.

Mr. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

Appellant, Robert Fields, presented a motion to the circuit court of Cook County asking that the court grant him increased visitation with his son. The son has been living with his mother since appellant and appellee were divorced. On April 25, 1974, the trial court ordered that appellant's son be taken to a psychiatrist

"for the specific purpose to answer the question 'Whether increased visitation with the father, Robert Fields, is in the best interests of the minor child?' The interview will be limited for this purpose only."

The order further provided that both parties will share the costs of the interviews. Appellant brings an appeal from the court's order of April 25, 1974.

We dismiss this appeal for want of a final appealable order.

In Irvin v. Poe (1974) 18 Ill.App.3d 555, 310 N.E.2d 32, the court set forth the applicable law and the reasons for dismissing an appeal from such an order:

"In order for this court to have jurisdiction the order of the circuit court from which an appeal is taken must be a final order. (Ill.Rev. Stat. 1971, ch.110A, par.301.) Accordingly, a final order must terminate the litigation between parties on the merits or dispose of the rights of the parties upon the entire controversy or some definite part thereof. (Brauer Machine and Supply Co. v. Parkhill Truck Co., 383 Ill. 569, 50 N.E.2d 836; Sebree v. Sebree, 293 Ill. 228, 127 N.E. 392. The order in this case neither terminates the litigation between the parties on the merits nor does it settle the rights of the parties in any respect. It also does not fall within



any of the exceptions to the final judgment rule contained in Supreme Court Rules 306, 307, and 308 (Ill.Rev.Stat. 1971, ch.110A, pars.306-308). \*\*\*" 18 Ill.App.3d at 555-56.

The order in the instant case is not a final appealable order, nor does it fall within any of the abovementioned exceptions. Accordingly, the appeal is dismissed.

Appeal dismissed.

McNamara and Mejda, JJ., concur.



3D  
30 I.A. 284



No. 60868

MORRIS ORMAN,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
CONTINENTAL CASUALTY COMPANY,	)	HONORABLE
	)	ALLEN HARTMAN,
Defendant-Appellant.	)	PRESIDING.

Before: MCGLOON, P.J., McNAMARA and MEJDA, JJ.

PER CURIAM:

Morris Orman, plaintiff, brought this action on a policy of insurance (policy) issued to him by the Continental Casualty Company, defendant, for reimbursement of hospital and medical expenses and for interest and attorney's fees. Summary judgment was entered for plaintiff and against defendant in the amount of \$1,530.64. Plaintiff's request for fees and interest was denied, as was defendant's cross-motion for summary judgment. Defendant appeals from the judgment entered for plaintiff, and plaintiff cross-appeals from the denial of his request for interest and fees.

The essential facts of this matter were substantially admitted in the pleadings and other documents filed in the trial court. There appears no genuine issue as to any material fact, and summary judgment is consequently the appropriate remedy to conclude this litigation. (Ill.Rev.Stat. 1973, ch. 110, par.57.) The only questions involved on this appeal are questions of law; they relate to an interpretation of the terms of the policy and to plaintiff's right to fees and interest for alleged vexatious and unreasonable delay in the reimbursement of the expenses.

The policy of insurance, a group contract, was issued to the plaintiff in December, 1966. Plaintiff was thereafter reimbursed by defendant under the policy for medical and hospital expenses incurred in connection with a condition of





bronchial asthma during the period between January 31, 1968 and January 31, 1971. On April 2, 1972, and on May 28, 1972, plaintiff incurred further hospital and medical expenses in connection with the same bronchial condition and submitted notices of claim to defendant for reimbursement under the policy. Plaintiff admits that the bronchial condition experienced by him prior to January 31, 1971, had continued thereafter, until his hospitalization on April 2, 1972, and that he had personally incurred expenses in that regard during that period. Defendant refused to reimburse plaintiff for the expenses incurred by reason of the April 2nd and May 28th hospitalizations and related medical services, and this action followed.

The complaint alleged that the policy of insurance was in force and effect at the time of the April 2nd and May 28th hospitalizations and related services, and that defendant therefore was obligated to honor plaintiff's notices of claim in that regard. The answer denied that any obligation was owed by defendant in that regard, and advanced the affirmative defense that the policy was not in force and effect at the time those expenses were incurred. The basis of the affirmative defense was that benefits under the policy were subject to a three year time limit for a given illness; that benefits could be reinstated for the same illness if the insured incurred no expenses for such illness, otherwise covered under the policy, for twelve consecutive months thereafter; and that plaintiff had in fact incurred expenses in the twelve-month period following January 31, 1971, disqualifying him from coverage for the April 2nd and the May 28th hospitalizations and related medical services under the foregoing reinstatement of benefits provision of the policy.

It appears from the pleadings, from the subsequently filed interrogatories and request for admission of facts, and the answers thereto, and from the respective motions for sum-



mary judgment and their supporting memoranda, that resolution of the issues in this matter centers around whether the policy contemplates that the expenses incurred during the twelve-month period are those paid solely by the insured or those for which the insured is reimbursed by the insurer.

The pertinent provisions of the policy in this regard are contained in Part I, the Benefits and Conditions section of the policy:

"When as the result of injury or sickness and commencing while the policy is in force as to such person, the Insured Person incurs expenses listed in Part II, the Company will pay eighty per cent (80%) of the reasonable expenses incurred by any Insured Person for such Covered Expenses which are in excess of the Deductible Amount stated in the Schedule not to exceed the Aggregate Amount Payable stated in the Schedule as the result of any one accident or any one sickness of any one Insured Person. In no event will benefits be payable hereunder for Covered Expenses incurred more than three years after the date of the accident or more than three years after the date of the first Covered Expense incurred as the result of any one sickness or upon release thereafter from a hospital at the end of a period of continuous hospital confinement that begins prior to the end of said three-year period. (Three-year provision.)

\* \* \*

If, following a period for which indemnity is payable under the policy by reason of any one sickness, no expense covered by the policy is incurred as a result of such sickness for a period of twelve consecutive months but thereafter expenses are incurred from the same cause, such expense so incurred shall be deemed to be the result of a different sickness and compensable as a new sickness, subject to a new Deductible Amount. (Twelve-month provision.)"

Part II of the policy defines, by category, what constitutes "Covered Expenses" within the terms of the policy. The balance of the policy contains matters which have no direct applicability to the instant matter, including the section relating to definition of terms.

Neither party has cited, nor has independent research disclosed, any Illinois authority interpreting the language involved in the instant policy. The out-of-state cases cited



by defendant, and also in part relied upon by plaintiff to support his position in this matter, deal only tangentially with the primary issue here presented. (See Callison v. Continental Casualty Company (Cal., 1963), 34 Cal. Rptr. 444; Washer v. Continental Casualty Company (Tex., 1967), 418 S.W.2d 900; Cottrill v. Michigan Hospital Service (1960), 259 Mich. 472, 102 N.W.2d 179.) The language of the instant policy must therefore be considered to determine its meaning and applicability in the context of this case.

A fair reading of the foregoing provisions of the policy discloses a straightforward and unambiguous statement governing the reinstatement of benefits under the policy. The language in the twelve-month provision, relating to expenses incurred which are covered by the policy, does not, as plaintiff contends, relate to expenses for which reimbursement has been made by defendant, but relates rather to expenses incurred by the insured, without regard to whether or not they were reimbursed.

The first sentence of the first paragraph of Part I of the policy, above quoted, contemplates reimbursement by defendant of a percentage of "the reasonable expenses incurred by an Insured Person for such Covered Expenses" where the "Insured Person incurs expenses listed in Part II \*\*\*." Expenses are "incurred" by the insured, not by the insurer. This interpretation is further manifest by the language of the first "Covered Expenses" category found in Part II of the policy, which differentiates between "expense incurred" for hospital services and the "amount payable by the [insurer] for such expenses." The second sentence of the first paragraph of Part I, above quoted, limits the maximum time for which benefits are payable, to a period of three years from, inter alia, the date of the first "Covered Expense incurred" as a result of any one sickness. The final paragraph of Part I, quoted above, provides for reinstatement of policy benefits if, following a period for



which indemnification is made by reason of a given sickness, no "expense covered by the policy is incurred" as a result of that same sickness for a period of twelve consecutive months.

It cannot be denied that the term "Covered Expenses" as employed throughout the policy, and the phrase "expense covered by the policy" as contained in the twelve-month provision, have the same meaning throughout the policy and require the same construction. It is also evident that the term "expense incurred" as used in that provision relates to expenses incurred by the insured and not those expenses as reimbursed by the insurer. Reading the first and last paragraphs of Part I together results in the unmistakable conclusion that the last paragraph relates to expenses incurred by the insured, and plaintiff advances no valid reason, nor does one otherwise appear, why that language should receive, in that single instance, a different meaning from that attributed to it throughout the rest of the policy. To interpret the language of the twelve-month provision in the manner advocated by plaintiff would do violence to the clear intent of the policy and would require application of two different meanings to a single concept within the policy. Plaintiff's interpretation, if adopted and applied consistently throughout the policy, would result in the illogical situation of the defendant's having to reimburse after a period of reimbursement and a period of twelve months without reimbursement conditioned upon whether the defendant had reimbursed during those twelve months and whether it reimbursed thereafter. Plaintiff's interpretation is both forced and would entail an illogical result.

Defendant does not quarrel with, but in fact agrees with plaintiff's position advanced in the trial court and on this appeal, that an ambiguous contract of insurance will be construed most strongly against the insurer; that well established proposition of law, however, has no application to the instant case. The language of the policy here in question is





straightforward and unambiguous as it relates to the reinstatement of benefits under the circumstances presented here. The trial court should therefore have allowed defendant's cross-motion for summary judgment and denied plaintiff's motion for summary judgment.

Inasmuch as plaintiff is not entitled to judgment for the reimbursement of expenses as demanded in the complaint it necessarily follows that he is not entitled to interest or attorney's fees in connection therewith. The trial court was correct in denying plaintiff's request in that regard.

For the foregoing reasons the judgment of the circuit court of Cook County is reversed and the cause is remanded with directions to allow defendant's cross-motion for summary judgment and to deny plaintiff's motion for summary judgment.

Judgment reversed,  
Cause remanded with directions.



3D  
30 I.A. 285



No. 61065

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Respondent-Appellee,	)	
	)	COURT OF COOK COUNTY.
v.	)	
	)	HONORABLE
SYLVESTER MINGO,	)	EARL E. STRAYHORN,
	)	PRESIDING.
Petitioner-Appellant.	)	

Before McGLOON, P.J., McNAMARA and MEJDA, JJ.

PER CURIAM:

Sylvester Mingo, petitioner, entered pleas of guilty to six indictments charging him with four armed robberies, a murder and an attempt murder. He was sentenced to terms of fifteen years to twenty years for murder, eight years to fifteen years for each armed robbery count, and four to ten years for attempt armed robbery, the sentences to run concurrently. No appeal was taken from those judgments of conviction. His subsequently filed pro se petition for relief under the Illinois Post-Conviction Hearing Act, challenging the sentence imposed and alleging a violation of his rights upon arrest, was not amended by appointed counsel and was dismissed without an evidentiary hearing upon respondent's motion.

On this appeal petitioner has abandoned the grounds alleged in the pro se post-conviction petition and instead seeks vacatur of the convictions on the grounds that the trial court at the change of plea rendered improper admonishments and improperly initiated the plea bargaining discussions. Upon a thorough review of the record we have concluded that the admonishments which petitioner now challenges do not give rise to a constitutional question cognizable in post-conviction proceedings and that petitioner's counsel at the change of plea, and not the trial court, initiated the plea bargaining discussions.

After the matter was called for trial and petitioner's counsel represented to the court that he had conferred with petitioner and that plea negotiations were desired, the court passed the matter so that counsel for both sides, without the



presence of the judge, could confer in that regard. When the matter was re-called, the trial court addressed the petitioner (and petitioner's co-defendant) and related to them the questions which would be taken up at a conference with the court, including the background of the men, their criminal history, the facts of the particular indictments, and the sentence recommendations. The court thereafter advised petitioner and his co-defendant that in the event that the court heard the facts of the indictments and the plea of guilty was withdrawn, petitioner and his co-defendant would not be entitled to a substitution of judges and would also be required to take a jury trial rather than a bench trial. In all other respects the petitioner was fully admonished as to his rights consistent with the requirements of Supreme Court Rule 402 before the acceptance of the pleas of guilty. (Ill.Rev. Stat. 1973, ch.110A, par.402.)

The remedy provided by the Post-Conviction Hearing Act is limited to those errors which are of a constitutional magnitude. (People v. Fuca (1969), 43 Ill.2d 182, 251 N.E.2d 239; People v. Blewett (1973), 11 Ill.App.3d 1051, 298 N.E.2d 366.) Neither the question of petitioner's right to a bench trial, nor of his right to a substitution of judges under the circumstances described by the trial judge during the admonishments is of constitutional magnitude. (Singer v. United States (1965), 380 U.S. 24, 85 S.Ct. 783; People v. Scott (1927), 327 Ill. 341, 157 N.E.2d 247; Ill. Rev.Stat. 1973, ch.38, par.114-5; ch.110A, par.402(d)(2).) Further, as noted above, the trial court did not initiate the plea discussions; the record discloses that the court stated only what was to be its position in the plea bargaining proceedings, after petitioner's counsel had initiated the negotiations. None of the matters raised here by petitioner is grounds for relief under the Post-Conviction Hearing Act.

For these reasons the order of the circuit court of Cook County dismissing the pro se post-conviction petition without an evidentiary hearing is affirmed.

Order affirmed.



3D  
30 I.A. 326

PEOPLE OF THE STATE OF ILLINOIS, )	APPEAL FROM
Plaintiff-Appellee, )	CIRCUIT COURT,
v. )	COOK COUNTY.
JEROME MARSHALL, )	HONORABLE
Defendant-Appellant. )	KENNETH E. WILSON,
	PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

Jerome Marshall, Ronald Stansberry, and Billy Hill were indicted for the murder of Alphonso Thomas. Stansberry and Hill entered negotiated pleas of guilty, but Marshall elected to stand trial on the charge of murder while committing the forcible felony of armed robbery (Ill. Rev. Stat. 1969, ch. 38, §9-1(a)(3)). A jury returned a verdict of guilty, and Marshall was sentenced to a term of 14 to 20 years in the penitentiary.

Marshall appeals from the conviction and raises several issues for review. However, since we have determined that the case must be reversed, the only question we deem it necessary to discuss is whether the evidence was sufficient to establish Marshall's guilt beyond a reasonable doubt.

The evidence presented at trial established that, on December 9, 1971, Alphonso Thomas was stabbed to death in the neck with an approximately 5-inch-long knife. The stabbing occurred in Thomas' basement apartment, located at 304 East 59th Street in Chicago. A neighbor, Gussie Brown, testified that she received a telephone call from Thomas about 3:30 p.m. on the date of the occurrence, during which Thomas stated that he had just been robbed. Ms. Brown immediately telephoned the Chicago Police Department and Donald Keyes, the uncle of Thomas. Then, Ms. Brown went to Thomas' apartment and, through a window, saw Thomas struggling to come to the door. However, according to the witness, Thomas collapsed before he reached the door. Chicago police officers arrived shortly thereafter, and Alphonso Thomas was found





lying face down in a pool of blood. Blood was smeared in all four rooms of the basement apartment.

Donald Keyes, the uncle of the deceased, was called as a witness by the State. Keyes stated that he examined the apartment shortly after the incident and reported to the police that the following items were missing: a 9-inch Panasonic color television set; a leather billfold; some food stamps; an electric iron; and some 45 rpm records. According to Keyes, the name "Al" had been written on the labels of the records by Thomas prior to his death. Keyes further testified that he had been asked to come to the Wentworth Avenue police station on December 14, 1971 to look at some records and that he recognized a record that belonged to the deceased because the initials "Al" appeared on the label. The witness identified People's Exhibit No. 2 as the record that had been recovered by the police. Keyes also identified People's Exhibit No. 1 as the television set which was missing from the apartment on December 9, 1971. According to Keyes, the apartment was again burglarized 2 days after the incident in which Thomas was stabbed.

Stanford Dillow, the manager of a tavern located 1 block from the scene of the crime, testified that Jerome Marshall entered his place of business between 3:30 and 4:30 p.m. on the date of the incident and asked if he wanted to buy a television set. After negotiating with Marshall for a short time, Dillow purchased the television set, identified as People's Exhibit No. 1, for \$55. On cross-examination, Dillow stated that the television set had been brought into his tavern by a man other than Marshall.

Chicago Police Officer Michael Boyle, head of the team assigned to investigate the homicide of Alphonso Thomas, testified that he recovered a Panasonic color television set, identified as People's Exhibit No. 1, from Stanford Dillow. Based upon state-



ments given by Dillow and another witness, the officer arrested Jerome Marshall at his home on December 12, 1971. While inside the apartment waiting for Marshall, the officer observed a large number of 45 rpm records. Marshall was then transported to the police station, advised of his constitutional rights, and questioned. Officer Boyle stated that Marshall at first denied any knowledge of the sale of the television set. When confronted with the statements of witnesses regarding his participation in the sale, according to Boyle, Marshall then acknowledged that he was involved in the sale of the television, but denied any knowledge of a killing in the area.

Officer Boyle testified further that, on December 14, 1971, he filed a complaint for a search warrant, alleging probable cause to believe that 45 rpm records marked with the name "Al" or "Helen" could be found in the Marshalls' apartment. A search warrant was issued pursuant to the complaint. The officer stated that a search of the apartment, where Jerome Marshall had lived with his mother and brothers, uncovered several hundred 45 rpm records. One of the records recovered from the Marshall apartment was identified by Donald Keyes as People's Exhibit No. 2.

Testimony regarding the events relating directly to the stabbing was provided by Marshall's co-indictees, Ronald Stansberry and Billy Hill. A plea bargain was effected on behalf of Billy Hill, who agreed to testify for the People in return for a 5 to 15-year sentence to be imposed on a plea of guilty to the charge of involuntary manslaughter. In addition, the State agreed that it would not oppose early parole for Hill, who had not been sentenced under the agreement at the time he testified. A plea bargain was also effected on behalf of Ronald Stansberry, who prior to trial had filed an alibi defense. After negotiations between counsel, Stansberry withdrew his plea of not guilty and entered a guilty plea to the murder of Alphonso Thomas. Stansberry was sentenced to a term of 14 to 25 years with the Department of Cor-



rections. He subsequently testified on behalf of Marshall.

Billy Hill, testifying for the People, admitted that he was an unemployed heroin addict with a \$50-a-day narcotics habit at the time of the occurrence. He testified that on the afternoon of December 9, 1971, he, Ronald Stansberry and a man identified as "Dice" planned to burglarize a house. Hill stated that Stansberry claimed to know of a house which had a television set that could be stolen. According to the witness, Stansberry borrowed a knife from a friend. Then, Hill, Stansberry and "Dice" went to the basement apartment of Alphonso Thomas at 59th Street and Prairie Avenue.

Hill testified further that he and "Dice" remained outside while Stansberry entered the Thomas apartment. While Hill and "Dice" were waiting outside the apartment, Jerome Marshall walked up to them and asked what they were doing. Hill explained that they were trying to get into Thomas' apartment. Then, according to Hill, he rang the apartment bell and was admitted by Stansberry. Hill stated that he told Marshall and "Dice" to "come on," and the three men entered the apartment where Stansberry was waiting.

Upon entering the apartment, Hill saw a trail of blood leading to a partially open bathroom door, through which he saw a man sitting on the bathtub. Stansberry explained that he and the man had "got into it," according to Hill. The witness testified that he then went into the living room and began unplugging the television set, assisted by Marshall. Then, according to Hill, Marshall left the area where the television set was located and began getting some 45 rpm records.

Hill testified further that he carried the television set out of the apartment. After their departure, Marshall told him that he knew where the television set could be sold. Hill and "Dice" then carried the television to a nearby tavern, following Marshall's instructions. When they were outside the tavern,



Marshall handed the 45 rpm records that he had been carrying to "Dice" and told "Dice" to take the records to his house. Hill and Marshall then entered the tavern with Hill carrying the television set. After some negotiations with the tavern owner, Stanford Dillow, \$55 was paid over to Marshall for the television set.

Finally, Hill testified that Marshall told him while the two men were incarcerated in the Cook County Jail awaiting trial for the murder of Thomas, that he (Marshall) had prevented Thomas from getting out of the bathroom after Stansberry and Hill left the scene.

Ronald Stansberry, testifying for the defense, stated that he, Billy Hill, and "Dice" planned on December 9, 1971 to burglarize a house. According to Stansberry, Jerome Marshall did not participate in the agreement to commit the burglary and also did not enter the apartment of Alphonso Thomas. Stansberry denied seeing Marshall on the date of the incident but stated that he did see Billy Hill. The witness tried unsuccessfully to invoke his right against self-incrimination. When required to testify, Stansberry stated that he did not see Marshall in the Thomas apartment, that he saw Hill and "Dice" when he came out of the apartment but did not see Marshall, that he told Hill he had "had it out with the man," and that the television set was still in the apartment when he left.

Thereafter, the jury returned a verdict of guilty to the indictment for murder, and Marshall was sentenced to a term of 14 to 20 years in the penitentiary.

In this appeal, Jerome Marshall contends, inter alia, that the evidence presented at trial did not establish his guilt of the murder of Alphonso Thomas beyond a reasonable doubt. He argues that the testimony of his co-defendant, Billy Hill, an ad-





mitted heroin addict, was induced by the State's promise of leniency and contradicted by the testimony of Ronald Stansberry, another co-defendant.

The role of a reviewing court, when considering conflicting evidence as to material facts in issue, is set forth by the court in People v. Coulson (1958), 13 Ill. 2d 290, 295-96, 149 N.E. 2d 96:

"\* \* \* [I]t is the duty of a jury, or of a court sitting without a jury, to determine the credibility of the witnesses and the weight to be given their testimony, and on review, this court will not substitute its judgment for that of the jury or trial court. (People v. Tensley, 3 Ill.2d 615; People v. Kirilenko, 1 Ill.2d 90.) But it is always the duty of this court to examine the evidence in a criminal case, and if it is so improbable or unsatisfactory as to raise a serious doubt of defendant's guilt the conviction will be reversed. (People v. Williams, 414 Ill. 414; People v. O'Connor, 412 Ill. 304; People v. Buchholz, 363 Ill. 270; People v. Fontana, 356 Ill. 461.) A judgment of conviction can be sustained only on credible evidence which removes all reasonable doubt of the guilt of the defendant, and it is the insufficiency of the People's evidence which creates such doubt. If a conviction is to be sustained, it must rest on the strength of the People's case and not on the weakness of the defendant's case. (People v. Widmayer, 402 Ill. 143; People v. Cullotta, 376 Ill. 333; People v. Washington, 327 Ill. 152.) The foregoing principle of law is a corollary of the presumption of innocence to which a defendant in a criminal case is entitled, and to the rule that the People have the burden of establishing the defendant's guilt beyond a reasonable doubt."

The record reveals that the State's case against Jerome Marshall rested largely upon the incriminating testimony of Billy Hill, his alleged accomplice. Hill admitted that he was an unemployed heroin addict. Although indicted along with Marshall, Hill successfully negotiated an agreement whereby he pled guilty to a reduced charge of involuntary manslaughter and was promised that the State would not oppose his early parole in exchange for his testimony against Marshall.

The testimony of accomplice witnesses is competent evidence in a criminal trial. (People v. Nastasio (1964), 30 Ill. 2d 51, 55, 195 N.E. 2d 144, 147; People v. Dell (1966), 77 Ill. App. 2d



318, 326, 222 N.E. 2d 357, 362.) However, the utmost caution is required of a court or jury when reliance is placed upon accomplice testimony alone. (People v. Hansen (1963), 28 Ill. 2d 322, 332, 192 N.E. 2d 359, 365; People v. Mostafa (1971), 5 Ill. App. 3d 158, 175, 274 N.E. 2d 846, 858.) When accomplice witnesses have hopes of reward from the prosecution, their testimony should not be accepted unless it carries with it absolute conviction of its truth. People v. Hermens (1955), 5 Ill. 2d 277, 285-86, 125 N.E. 2d 500; People v. Zaeske (1966), 67 Ill. App. 2d 115, 121, 213 N.E. 2d 577.

The reasons for the restricted weight to be placed upon the uncorroborated testimony of an alleged accomplice was stated in People v. Hermens (1955), 5 Ill. 2d 277, 285, 125 N.E. 2d 500, 504-05:

"\* \* \* [S]uch testimony has inherent weaknesses, being testimony of a confessed criminal and fraught with dangers of motives such as malice toward the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution, which must always be taken into consideration."

In this case, Hill admitted that he had supported his heroin addiction by selling "dope" and committing a number of "strong-armed robberies." More importantly, he acknowledged planning and participating in the crime. However, Hill's testimony implicating Marshall in the robbery was directly contradicted by that of another accomplice, Ronald Stansberry, who testified that Marshall neither participated in the agreement to burglarize the apartment nor entered it. Both Hill and Stansberry agreed that Marshall was involved in neither the planning nor the early stages of the robbery.

The material corroboration or direct contradiction of an accomplice's testimony is entitled to great weight. (People v. Hermens (1955), 5 Ill. 2d 277, 286, 125 N.E. 2d 500, 505; People v. Mostafa (1971), 5 Ill. App. 3d 158, 179, 274 N.E. 2d 846, 860.)



The incriminating testimony of Hill, placing Marshall at the scene of the crime, was directly contradicted by Stansberry. Hill's testimony of an alleged conversation with Marshall while the two were incarcerated, in which Marshall made certain admissions, is uncorroborated and, in our opinion, unconvincing.

We are not unmindful that the verdict of a jury is entitled to great weight. However, the jury's verdict is not conclusive of the sufficiency of the evidence to sustain a conviction, and it is the duty of the court, on review, to set the verdict aside if satisfied, from a consideration of all the evidence, that there is a reasonable doubt of the defendant's guilt. (People v. Kessler (1929), 333 Ill. 451, 460, 164 N.E. 840, 844; People v. Mostafa (1971), 5 Ill. App. 3d 158, 274 N.E. 2d 846. See also People v. Kilgore (1973), 15 Ill. App. 3d 862, 305 N.E. 2d 328.) While questions of credibility and weight are for the jury, and we do not lightly take the step of reversing a jury's determination of guilt, this conviction cannot stand. People v. Kilgore, (1974), 59 Ill. 2d 173, 319 N.E. 2d 489; People v. Gardner (1966), 35 Ill. 2d 564, 221 N.E. 2d 232.

After carefully reviewing the record, we are convinced that there is insufficient credible evidence to support the jury's verdict and establish the defendant's guilt beyond a reasonable doubt. Therefore, we reverse the conviction. Since it does not appear that the prosecution would be able to produce additional evidence upon another trial, the judgment is reversed without remand.

Reversed.

DIERINGER, P.J. and ADESKO, J., concur.



Ba. 6.20

[illegible]

APPEAL FROM THE

CIRCUIT COURT OF

COOK COUNTY.

Hon. Minor K. Wilson,  
Presiding.

In October of 1969, the defendant Ronald Clark was placed on five years probation, the first nine months of which were to be spent in the House of Correction, following his plea of guilty to a charge of armed robbery. On September 26, 1973, defendant's probation was revoked after a hearing in the Circuit Court of Cook County. He was sentenced on the original conviction to serve a term of not less than two nor more than six years in the Illinois State Penitentiary. Defendant now appeals to this court claiming that:

1. The trial court erred in failing to admonish him at the probation revocation hearing in compliance with Illinois Supreme Court Rule 402. (Ill. Rev. Stat., 1973, ch. 110A, par.402.); and
2. He should have been given credit for time spent on probation.

When defendant's brief was filed, the Illinois Supreme Court had not yet announced its decision in People v. Beard, 59 Ill. 220, 319 N.E. 2d 745. In Beard, the Supreme Court stated that Rule 402 is not applicable to probation revocation hearings (59 Ill. 2d at 226-27) and defendant's contention in the instant case must be rejected.

Defendant is correct in his argument that the trial court erred in failing to credit the time spent on probation when imposing sentence on defendant. As was held in People v. Talach, 19 Ill. App. 3d 189, 311 N.E. 2d 319 and People v. Burton, 14 Ill. App. 3d 1096, 303 N.E. 2d 16, defendant is





entitled to credit on his sentence for the time he was on probation, from the date he was placed on probation to the date upon which the warrant for his arrest was issued. This cause must then be remanded to the trial court for a determination of the proper amount of time to be credited to defendant's sentence in accordance with the views of this opinion and the decisions cited herein.

The judgment of the Circuit Court of Cook County is affirmed and the cause remanded for resentencing.

JUDGMENT AFFIRMED AND CAUSE  
REMANDED FOR RESENTENCING.

(ABSTRACT ONLY)

DIERINGER, P.J., and BURMAN, J., concur.



Barren.  
CHICAGO BAR  
SEP 17 1975  
ASSOCIATION

3D  
30 I.A. 382

60474

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
v.	)	
	)	
HENRY MCGEE,	)	HONORABLE
	)	FRANCIS T. DELANEY,
Defendant-Appellant.	)	PRESIDING.

BEFORE BARRETT, P.J., DRUCKER, J. and LORENZ, J.  
PER CURIAM, First District, Fifth Division.

Henry McGee, defendant, was originally charged by indictment with the crime of robbery (Ill. Rev. Stat. 1967, ch. 38, par. 18-1). On September 12, 1969, defendant entered a plea of guilty and was sentenced to probation for a period of five years, with the condition that the first year be served in Cook County Jail.

On November 1, 1972, a hearing was held on a rule to show cause why defendant's probation should not be terminated based upon the fact that he had subsequently been convicted of the crime of theft. At the hearing on the rule to show cause, the State introduced a certified copy of defendant's conviction of the crime of theft upon which he was sentenced to a term of three to eight years. The defendant testified that he was the same person who was convicted of the crime of theft and sentenced to a term of three to eight years. At the conclusion of the hearing, the trial court revoked defendant's probation and, after a hearing in aggravation and mitigation, sentenced him to a term of two to eight years to be served concurrently with the previously imposed sentence on the crime of theft.

Defendant wished to appeal the revocation of his probation and the Public Defender of Cook County was appointed to represent him. After examining the record, the Public Defender



has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief states that the only possible arguments which could be raised on appeal are that defendant was deprived of due process of law at the probation revocation hearing and that the evidence adduced at the hearing was insufficient to prove that the defendant had violated the terms of his probation. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Copies of the motion and brief were mailed to the defendant on April 4, 1975. He was informed that he had until June 9, 1975 to file any additional points he might choose in support of his appeal. He has not responded.

The first possible argument which could be raised on appeal is that the defendant was deprived of procedural due process of law at the probation revocation hearing. The procedure for revoking probation contemplates three requirements. It must establish that the defendant has been given notice and a copy of the charge, that he has had an opportunity to be heard and that a conscientious judicial determination has been made in accordance with procedural methods, which include the right to counsel and a reasonable time to prepare a defense. Gagnon v. Scarpelli, 411 U.S. 778; People v. Morales, 2 Ill.App.3d 358, 276 N.E.2d 391.

In the case at bar, the record affirmatively shows that defendant was given notice and a copy of the charge. He was represented by counsel and presented a defense at the hearing on the rule to show cause. A complete review of all of the trial court proceedings leads to the conclusion that defendant was not in any manner deprived of due process of law.



The second possible argument which could be raised on appeal is that the evidence was insufficient to establish that defendant had violated the terms of his probation. A violation of probation need be proven only by a preponderance of the evidence. (People v. Crowell, 53 Ill.2d 447, 292 N.E. 2d 721.) Here, the State introduced a certified copy of defendant's conviction for the crime of theft. Thereafter defendant, in testifying at the probation revocation hearing, admitted that he was the same man who, after being placed on probation, was convicted of the crime of theft. The evidence adduced at the hearing on the rule to show cause clearly established that defendant violated the conditions of his probation by committing another offense for which he had been convicted.

We have examined the record and concur in the opinion of the Public Defender that none of the arguments thus raised has substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

PUBLISH ABSTRACT ONLY.





3D  
30 I.A. 383



No. 60519

PEOPLE OF THE STATE OF ILLINOIS, )  
Respondent-Appellee, )  
v. )  
ALLEN STANBEARY, JR., )  
Petitioner-Appellant.)

APPEAL FROM THE  
CIRCUIT COURT OF  
COOK COUNTY

HONORABLE  
MEL R. JIGANTI,  
PRESIDING.

BEFORE Barrett, P.J., Lorenz and Sullivan, JJ.

Per Curiam, First District, Fifth Division.

Petitioner appeals from the dismissal without an evidentiary hearing of his pro se petition for relief filed pursuant to the Illinois Post-Conviction Hearing Act. (Ill. Rev. Stat. 1973, ch. 38, par. 122-1, et seq.) He contends that he was denied effective assistance of trial counsel in the post-conviction proceedings and that the dismissal of his petition resulted from a material misrepresentation by the assistant state's attorney during the hearing on the State's motion to dismiss.

Petitioner was found guilty by a jury of the offense of murder, sentenced to a term of 35 years to 75 years and remanded to the custody of the Illinois Youth Commission. That judgment was affirmed on June 10, 1970, on direct appeal to this court; People v. Stanbeary, 126 Ill. App. 2d 244, 261 N.E.2d 765.

The instant verified petition for relief under the Post-Conviction Hearing Act was filed pro se by petitioner on October 5, 1972. Several grounds for reversal of the conviction were alleged in the petition, namely, unlawful arrest, failure to advise petitioner upon arrest of his constitutional rights, denial of a fair trial, denial of due process and equal protection, and lack of evidence upon the trial. No affidavits or other supporting documents accompanied the petition.

The public defender of Cook County filed an appearance as



counsel for petitioner in these proceedings on November 16, 1972, and on January 30, 1973, private counsel was appointed to represent him. On April 18, 1973, the State filed a motion to dismiss the post-conviction petition on the grounds that it alleged no constitutional issues; that if such issues were raised they were bare allegations, not requiring a hearing; and that the matters alleged in the petition were barred by the doctrine of res judicata because of the affirmance of the conviction on direct appeal to this court.

Hearing was held on the motion to dismiss the post-conviction petition on January 30, 1974, before the same judge who presided over the trial of the case. Petitioner's counsel represented to the court that he had visited petitioner in the penitentiary on two occasions, carefully reviewed the record in the case, and found no basis for amending the pro se petition. Counsel also alluded to the allegation in the petition relating to the alleged absence of constitutional warnings upon petitioner's arrest, but stated that that point had been raised in pre-trial hearings before the court and ruled on at that time. Counsel then concluded his remarks, stating that that was as much as he had to say to the court at that time. The State alluded to its motion to dismiss the post-conviction petition and to this court's affirmance of petitioner's conviction on the direct appeal; the court directed petitioner's counsel to the motion to dismiss, to which counsel remarked that "that point was considered by the Appellate Court." The motion to dismiss the post-conviction petition was thereupon allowed.

In addition to the oral statement to the court, petitioner's counsel filed a written certificate pursuant to Supreme Court Rule 651 (c), (Ill. Rev. Stat. 1973, ch. 110A, par. 651(c).) and therein represents that he was appointed in this matter on June 11, 1973; that he obtained a copy of the common law record and the report of proceedings from petitioner's prior counsel; that he also obtained from prior counsel copies of correspondence theretofore had with petitioner; that he discussed with prior counsel the allegations



raised by petitioner; that he met with petitioner at the penitentiary in July and October, 1973, and discussed with him the grounds upon which the post-conviction petition was based; that petitioner completed for counsel a questionnaire which had been provided by the circuit court; that counsel made a careful study and review of the record of proceedings to determine whether grounds exist for post-conviction relief; and that no amendment was made to the pro se petition because counsel concluded that the petition as filed by petitioner adequately presented his contentions.

Petitioner's contention that he was denied effective assistance of counsel in these proceedings is based upon his position that counsel failed to familiarize himself with the issues raised on the direct appeal, failed to adequately present to the court the allegations advanced in the post-conviction, and failed to examine all records in the proceedings which resulted in petitioner's conviction.

Petitioner's position that his counsel failed to familiarize himself with the issues raised on the direct appeal is bottomed upon the allegation in the post-conviction petition that he was not advised at the time of his arrest of his constitutional rights, upon this court's opinion in the direct appeal which does not deal with that question, and upon his counsel's statement to the court that it had ruled upon a pre-trial motion in that regard; he reasons that counsel thereby demonstrated his lack of understanding of post-conviction procedures and rules since a ruling by a trial court on a pre-trial motion does not dispose of such question as far as post-conviction relief is concerned. By way of a footnote in his brief on this appeal petitioner states that he does not challenge the effectiveness of his trial counsel nor that of his counsel on the direct appeal, but that his argument is limited to what is necessary to guarantee effective representation at a post-conviction hearing.

Petitioner states that his counsel at trial filed a pre-trial motion to suppress statements made by him, on the ground that he had not been advised of his constitutional rights. That point was



not raised on the direct appeal to this court. However, this court on that appeal was not unaware that a question concerning such warnings could have been there presented since its opinion expressly alludes to the testimony of a police officer that the warnings were given and to the testimony of petitioner's father that the warnings were not given. As such, that point could have been raised on the direct appeal; it was not raised and was therefore waived. See People v. French, 46 Ill. 2d 104, 262 N.E.2d 901.

Petitioner now suggests that fundamental fairness will not permit the application of the waiver doctrine where the direct appeal is handled by counsel who is a member of the same office as counsel who handled the trial of the matter. (People v. McClain, 15 Ill. App. 3d 929, 305 N.E.2d 423.) However, petitioner does not request this court to invoke that proposition in this case. Rather, he has expressly stated that he does not challenge the effectiveness of his trial counsel or his appellate counsel, who were members of the same law office, an allegation which is necessary to support application of such proposition. Post-conviction counsel's reference to the trial court's ruling on the pre-trial motion to suppress the statements does not, as alleged by petitioner, indicate a lack of understanding on his part of post-conviction proceedings and rules.

Petitioner's position that counsel failed to adequately present the allegations of the post-conviction petition to the court is likewise without merit. He does not claim that any of those allegations had merit but he simply states that counsel did not argue them to the court nor did he amend the pro se petition. Counsel's certificate pursuant to Rule 651(c) indicates that he carefully considered the record of the trial; that he personally consulted with petitioner on two occasions and with petitioner's prior counsel concerning the merits of the pro se petition; that he considered prior counsel's correspondence with petitioner in the matter; and that he determined therefrom that an amendment of the petition was unnecessary. It is clear that, in counsel's judgment, none of the matters raised





in the petition were of merit and it was consequently not ineffectiveness of counsel for him to have refrained from amending the pro se petition or from arguing such matters to the court. See People v. Frank, 48 Ill.2d 500, 272 N.E.2d 25.

In the case of People v. Craig, 40 Ill. 2d 466, 240 N.E.2d 588, cited by petitioner in support of the foregoing position, the Supreme Court was presented with a situation where counsel failed to communicate with the petitioner concerning the allegations in the petition or attempt to amend the petition or to resist the State's motion to dismiss. Here, counsel made a study of the record and prior correspondence and conferred with petitioner and petitioner's prior counsel before arriving at a determination that the allegations in the pro se petition did not warrant amending.

Petitioner's contention that counsel failed to examine all records in the proceedings which resulted in his conviction centers on the proceedings in juvenile court which resulted in his transfer for trial in the criminal court. He argues that the certificate of counsel filed pursuant to Rule 651(c) fails to affirmatively show that counsel examined the juvenile court record, which he contends was a part of the record of the proceedings resulting in his conviction.

There is no requirement that the certificate of counsel must detail what records counsel has examined, but merely that he has examined "the record of the proceedings at the trial." (Ill. Rev. Stat. 1973, ch. 110A, par. 651(c).) The instant certificate of counsel recites that counsel "obtained a copy of the common law record and report of proceedings" and "made a careful study and review of the record of proceedings." Counsel's certificate conforms to the requirements set forth in Rule 651(c). (People v. Slaughter, 39 Ill. 2d 278, 285, 235 N.E.2d 566.) Further, petitioner fails to demonstrate in what manner he was prejudiced in the juvenile court proceedings; his argument in this regard is directed solely at what counsel allegedly failed to do rather than what that record, which is a part of the instant record on appeal, would or would not have shown. This point is not well taken.



Petitioner contends that, apart from the foregoing allegations of ineffective assistance of counsel, the assistant state's attorney misrepresented to the trial court that the issue concerning the alleged failure to advise petitioner of his constitutional rights had been "decided" by this court on the direct appeal. Petitioner states that the opinion of this court on the direct appeal does not "decide" such issue.

The assistant state's attorney stated to the trial court that the issue in question "that Counsel speaks about is in the Appellate Court affirmance." Petitioner's argument in this regard is an exercise in semantics, since the State's comment is at best equivocal. The State did not represent, as petitioner contends, that such issue was raised and decided by this court on that appeal, but merely that such issue is "in the Appellate Court affirmance." Prior to the representation now challenged by petitioner, the State noted to the court that the doctrine of res judicata applied to issues which were reviewed or which should have been reviewed, and that the doctrine of "whatever" (sic, waiver) also applied. It is apparent that the State was simply stating that the issue in question could have been raised by petitioner on the direct appeal and that it was therefore included in this court's affirmance of the conviction by reason of the waiver doctrine. See People v. French, supra. There was no error in this regard.

The judgment of the circuit court of Cook County dismissing the pro se post-conviction petition without an evidentiary hearing is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]





60826

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY,
vs.	)	First Municipal District.
	)	
ANTHONY ADAMS (Impleaded),	)	HONORABLE MARK E. JONES,
Defendant-Appellant.)	)	Presiding.

BEFORE DOWNING, P.J., STAMOS and LEIGHTON, JJ.

PER CURIAM:

Anthony Adams, defendant, was found guilty after a bench trial of the offense of unlawful use of weapons in violation of Section 24-1(a)(10) of the Criminal Code and was fined \$75. (Ill. Rev. Stat. 1973, ch. 38, par. 24-1(a)(10).) On appeal he contends that he was not proven guilty beyond a reasonable doubt.

At trial, Chicago Police Officer Morrissey testified that on May 25, 1974, at approximately 1:15 A.M., he received a simulcast over his police radio concerning four men with guns riding in a blue and white Oldsmobile. Morrissey saw such an Oldsmobile, containing four occupants, as the car was being parked at the curb near 7801 South Marquette, Chicago. Morrissey asked the four occupants, whom he identified in open court, to get out of the car and he then conducted a search of the vehicle. He found a loaded gun underneath the front passenger seat, which had been occupied by defendant. Morrissey stated he ascertained that defendant was the owner of the automobile, although Douglas Coleman was driving at the time. On cross-examination Morrissey said that the gun was concealed under the seat so he could not see it from where he was standing on the street. He also stated that defendant said his mother bought the car for him but it was registered in his mother's name.



Nathaniel Hawkins testified that he was sitting in the back seat of the automobile; that Morrissey searched the automobile but Hawkins did not see him recover a weapon from the car, although Morrissey did show him a weapon. Hawkins said he never had the weapon in his possession and did not know there was a weapon in the car.

Douglas Coleman testified that on May 25, 1974, he was driving the automobile with Nathaniel Hawkins, Ricky Powell and the defendant as passengers. He was ordered to get out of the car and Morrissey subsequently showed him a weapon which Morrissey said he recovered from the car. Coleman said he had never seen the weapon before and did not have it in his possession. Coleman testified that the car belonged to the defendant.

Ricky Powell testified that he was in the back seat of the car; that at no time did he have the weapon in his possession; and that he had never seen it prior to Morrissey showing it to him.

Defendant testified that on May 25, 1974, he was arrested while sitting in the car. He said he did not own the car; that it belonged to his mother; that the title was registered in her name; and that she permitted him to use the car. Defendant said he was on the passenger side when the weapon was recovered from the car; that he had never had the weapon in his possession at any time and had never seen it prior to the time Morrissey showed it to him. On cross-examination defendant said that he could not remember telling Morrissey that it was his car and that his mother had purchased it for him.

On rebuttal, Police Officer Morrissey testified that when he arrested defendant, the defendant told him that the car belonged to him.

Defendant contends that the State failed to prove beyond a reasonable doubt that he had knowledge of the presence of the





loaded gun in the automobile.

It is true that in an unlawful use of weapons case it is necessary for the State to prove that defendant had knowledge that the gun was in the car. However, knowledge may and must often be proved by circumstantial evidence. People v. McKnight, 39 Ill.2d 577, 581, 237 N.E.2d 488; People v. Williams, 132 Ill. App.2d 806, 808, 270 N.E.2d 144; People v. Ehn, 24 Ill.App.3d 340, 348, 320 N.E.2d 536.

In the case at bar, Police Officer Morrissey was notified by simulcast to be on the lookout for a blue and white Oldsmobile occupied by four men with guns. Morrissey saw such an Oldsmobile, containing four occupants, as the car was being parked at the curb near 7801 South Marquette, Chicago. Morrissey conducted a search of the car and found a loaded gun underneath the front passenger seat, which had been occupied by defendant.

Morrissey testified defendant said that the car belonged to him. On cross-examination, Morrissey stated defendant said his mother bought the car for him but it was registered in her name. Douglas Coleman, who was driving the automobile, said that the car belonged to defendant. Defendant testified that the car belonged to his mother but she permitted him to use it. On rebuttal, Police Officer Morrissey testified that when he arrested defendant, the defendant told him that he owned the automobile.

The foregoing facts raised a reasonable inference that defendant had knowledge of the loaded gun underneath the front passenger seat, where he was sitting. In People v. McKnight, supra (cited by defendant), the court, in sustaining the conviction of the defendant for possessing a gun while riding in an automobile, held that defendant's knowledge that the gun was in the car "may and must often be proved by circumstantial evidence." In People v. Crowder, 4 Ill.App.3d 1079, 283 N.E.2d 342 (also cited by defendant), defendants Jerome Crowder, Lewis Hoover and Edward



Smith were riding in an automobile with Richard Childress, the owner and driver of the automobile, and Frank Tramell. Crowder, a cripple and confined to a wheelchair due to an earlier injury, was seated next to the driver. The defendants were charged and found guilty of unlawful use of weapons. Neither Tramell nor Childress were made parties defendant. The court reversed the conviction because defendants denied knowing that the weapons were in the automobile and none of the concealed weapons were found under the seats of any of the defendants.

In the case at bar, the automobile was either owned by defendant or his mother and was accessible to him. The loaded gun was found under the seat occupied by defendant. Further, Police Officer Morrissey had previously been alerted of the presence of guns in the automobile. The totality of the evidence was sufficient for the trial court to find defendant guilty of knowingly carrying a loaded gun concealed in an automobile in violation of Section 24-1 of the Criminal Code. People v. Ehn, supra; People v. Zazzetti, 6 Ill.App.3d 858, 286 N.E.2d 745; People v. Barksdale, 14 Ill.App.3d 415, 302 N.E.2d 718.

Defendant contends that knowledge of the presence of the loaded gun cannot be imputed to him because he and the other occupants of the car denied having previously seen or possessed the gun. In People v. Williams, supra, the defendant denied knowledge or possession of the weapons. The court sustained the conviction (132 Ill.App.2d at p. 808) because of the "reasonable inference of knowledge the court could draw from all of the uncontroverted circumstantial evidence presented at the trial."

Here, there was a conflict in the evidence. This would not justify the court to reach a result different from that of the trial court, which heard the evidence presented and observed the demeanor of the witnesses. (People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378; People v. Arndt, 50 Ill.2d 390, 280 N.E.2d 230;



People v. Cannon, 18 Ill.App.3d 781, 310 N.E.2d 673; People v. Spriggs, 20 Ill.App.3d 804, 314 N.E.2d 573.) In light of the record, it was not error for the trial court to find that defendant was guilty beyond a reasonable doubt.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

6-30-75  
2nd Dr.  
30 pin.

3D  
30 I.A. 397



No. 60505

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
JAMES GRAHAM,	)	HONORABLE
	)	SYDNEY A. JONES,
Petitioner-Appellant.	)	PRESIDING.

Before McGLOON, P.J., DEMPSEY and MEJDA, JJ.

PER CURIAM:

On January 18, 1972, James Graham, the petitioner filed a pro se post-conviction petition attacking his conviction for murder, a conviction which was upheld by this court in People v. Graham (1970) 127 Ill.App.2d 272, 262 N.E.2d 243. Counsel was appointed and a second amended post-conviction petition was denied, after a hearing on September 19, 1973, and this appeal followed.

On January 23, 1975, petitioner's appellate counsel, the public defender of Cook County, filed a written motion for leave to withdraw as counsel on appeal, accompanied by a brief pursuant to Anders v. California (1967) 386 U.S. 738, contending that the record presented no meritorious issue which would support an appeal. Copies of the motion and the brief were mailed to the petitioner and on January 31, 1975, this court advised petitioner of the motion to withdraw and informed him that he had until April 1, 1975, to file any additional points he might choose in support of his appeal. He has not responded.

The brief of the public defender discusses four possible arguments which could be raised on appeal, concluding that each of them are wholly without merit and frivolous. Three of these contentions deal with the failure of one Vernita Almorey to testify as a witness on the petitioner's behalf at trial.





On the direct appeal, this court rejected the petitioner's contention that the failure of the State to call Vernita Almory as a witness on its behalf created an inference that her testimony would have been adverse to the State. (127 Ill. App.2d 272, 279.) Petitioner now contends his trial counsel informed him prior to trial that Vernita Almory would testify for him that he "shot the deceased in self-defense to protect himself from an attack made with a hatchet" and also informed him that Vernita Almory had made statements to Cook County law enforcement officers that petitioner had shot the deceased in self-defense.

Petitioner's first amended pro se petition filed April 5, 1972 contained an affidavit by George C. Howard, the original trial attorney, in which Howard stated that during the course of his defense of the petitioner he made "numerous attempts and efforts" to locate Vernita Almory but these attempts were "futile". Attached to the State's motion to dismiss the second amended post-conviction petition was a statement given by Marion Hopkins on August 14, 1967, the date of the offense, in which she recites a conversation of Vernita Almory describing the shooting in question saying that she (Vernita Almory) came out of the building at 6229 South Woodlawn at about 7:25 A.M. to go to the store when the petitioner grabbed her and pulled her into his car; since she expected the deceased to go out of the building, she wanted to divert the petitioner's attention from the entrance of the building and when the deceased came out she yelled, "Honey, watch it", at which point the petitioner got out of the car with a rifle, climbed up on the car and then she heard a shot; when the petitioner pulled her into his car, he said to her, "I don't want to have to kill you too".

Another exhibit attached to the motion to dismiss was a statement by Vernita J. Almory, also given on August 14, 1967,



at which time, after answering a series of questions concerning her name, address, telephone number, age, date, place of birth, marital status and occupation, she "became hysterical in an apparent state of shock" and further efforts to continue with the statement "ceased".

Attached to the public defender's motion to withdraw is a letter by William J. Gibbons, who represented the petitioner at the post-conviction hearing, in which he states that on August 10, 1973, he contacted Vernita Almore by telephone and she informed him that petitioner had been the aggressor in the encounter and she could not give testimony favorable to him either in person or by affidavit.

Petitioner now contends that the absence of Vernita Almore's testimony denied him a fair trial because either the judge or defense counsel should have called her and the failure of his own lawyer to call her denied him his right to the effective assistance of counsel. These issues may be considered waived by petitioner's failure to raise them in his direct appeal, a rule that will be relaxed only when considerations of fundamental fairness so dictate. (People v. Derengowski (1970) 44 Ill.2d 476, 256 N.E.2d 455; People v. Hamby (1965) 32 Ill.2d 291, 205 N.E.2d 456.) Nevertheless, the arguments are without merit.

The affidavit of petitioner's trial counsel indicates that he tried to contact the missing witness, but was unable to do so. At the hearing on the post-conviction petition, the trial judge was of the opinion, after reviewing the documents, that Vernita Almore's testimony would not have been helpful to the petitioner. No evidence was presented to support petitioner's assertion that trial counsel lied to him or that Vernita Almore promised she would testify in his behalf.

The petitioner did not sustain his burden of showing actual incompetence of counsel or substantial prejudice that



would likely have changed the outcome of this case. (People v. Morris (1954) 3 Ill.2d 437, 121 N.E.2d 810.) Trial counsel's affidavit indicates he tried unsuccessfully to locate this witness. In any event, her testimony clearly would not have been helpful to the petitioner.

Petitioner next contends the State knowingly concealed and suppressed statements by Vernita Almory that would have exonerated him. An allegation of suppression of evidence favorable to the petitioner is of constitutional dimension. (People v. Sims (1972) 4 Ill.App.3d 878, 282 N.E.2d 16.) However, the record here shows that the "statement" does not exculpate the petitioner and would rather have been damaging to the petitioner's case.

Finally, petitioner alleged that he was denied his right to a speedy trial "when neither the State nor the defense moved for a continuance within 120 days from the date of petitioner's arrest" (C.57). As the public defender points out, this allegation was insufficient because it did not state that the petitioner was incarcerated pending trial. As discussed above, the issue may also be considered to have been waived because not raised on the direct appeal. In any event, it has been held that "an allegation of a violation of the 120-day rule in bringing a petitioner to trial is not constitutional in scope", and therefore, may not be considered in a post-conviction proceeding. People v. French (1970) 46 Ill.2d 104, 107, 262 N.E.2d 901; People v. Barr (1973) 14 Ill.App.3d 742, 745, 303 N.E.2d 202, affirmed 58 Ill.2d 187, 317 N.E.2d 559.

We have examined the record and concur in the opinion of the public defender that none of the arguments thus raised have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are not also frivolous. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.



3D  
30 I.A. 488

STATE OF ILLINOIS



74-293

People vs. Joseph Perry

APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-five within and for the Third District  
of Illinois:

Present— PC

HON. ALLAN L. STODER, Presiding Justice

HON. JAY J. ALLOY, Justice

HON. RICHARD STENGEL, Justice

HON. TOBIAS BARRY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
July 25, 1975 the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:





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In The  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT  
A. D. 1975

---

PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the Circuit
	)	Court of Peoria County
Plaintiff-Appellee	)	
	)	
vs.	)	
	)	
JOSEPH PERRY,	)	Honorable
	)	Richard E. Eagleton
Defendant-Appellant	)	Presiding Judge

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PER CURIAM

Abstract

---

On March 31, 1974, Joseph Perry was charged with the unlawful possession of more than 500 grams of a substance containing cannabis. The defendant was represented by retained counsel. After a bench trial defendant was found guilty and was sentenced to a term of not less than one nor more than five years of imprisonment. Prior to proceeding with the bench trial, the court ascertained that the defendant had knowingly and voluntarily waived his right to trial by jury. The defendant had also been charged with unlawful use of weapons, but at the close of the State's evidence the trial court granted defendant's motion for a finding of not guilty on that charge.

The State Appellate Defender appointed to represent the defendant has filed a motion together with memorandum indicating that after an examination of the record the Defender has been unable to find any arguable errors which would warrant continuance of this appeal. This motion in accordance with the precedent of Anders v. California, 386 U.S. 738 (1967), requests that such counsel be permitted to withdraw. On July 15, 1975, such counsel informed defendant by letter that he would file a motion for leave to withdraw.



From the motion and supporting brief it appears that; (1) the complaint states a cause of action, the court had jurisdiction of the subject matter and the person of the defendant, defendant was represented by retained counsel and defendant voluntarily and knowingly waived his right to trial by jury; (2) no reversible error occurred during the trial before the court without a jury; (3) there is ample evidence which if believed, is sufficient to support the judgment that the defendant was guilty of the offense charged; (4) the sentence imposed is within the penalty provided by statute and no claim is made that such sentence is excessive under the circumstances.

We agree that there are no arguable errors to be considered on appeal and that continuance of this appeal could not possibly result in success and would be wholly frivolous.

For the reasons stated, the action of the Circuit Court of Peoria County in this cause is affirmed and the motion of the State Appellate Defender to withdraw as counsel for defendant Joseph Perry is allowed.

Judgment affirmed and Withdrawal Motion allowed.





APPELLATE COURT      THIRD DISTRICT  
OTTAWA

75-89

e vs. Clarence McCallum

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-five within and for the Third District  
of Illinois:

Present—      PC

HON. ALLAN L. STODER, Presiding Justice

HON. JAY J. ALLOY,      Justice

HON. RICHARD STENGEL,      Justice

HON. TOBIAS BARRY,      Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

July 31, 1975 the Opinion of the

Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:



---

In The  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT  
A. D. 1975

---

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of the Twelfth
Plaintiff-Appellee	)	Judicial Circuit,
	)	Will County.
vs.	)	
	)	
CLARENCE McCALLUM,	)	Honorable
	)	Angelo F. Pistilli
Defendant-Appellant	)	Presiding Judge

---

PER CURIAM

Abstract

Clarence McCallum was indicted by the Will County grand jury for the offense of armed robbery. The defendant was represented by court-appointed counsel and after a jury trial he was found guilty and sentenced to a term of not less than eight (8) nor more than twenty (20) years of imprisonment.

The State Appellate Defender appointed to represent the defendant has filed a motion together with brief and memorandum representing that after an examination of the record the Defender has been unable to find any arguable errors which would warrant continuance of this appeal. On July 24, 1975, such counsel informed defendant by letter that he would file a motion for leave to withdraw. This motion is presented pursuant to Anders v. California, 88 U.S. 738 (1967).

Prior to trial defendant filed a motion to suppress any in-court identification by him by the eye witness on the basis of unfair and suggestive photographic and in-custody lineups in violation of his Sixth and Fourteenth amendment rights. We find the trial court was correct in finding that the defendant





failed to show the photo identification procedure to be so impermissably suggestive as to give rise to a substantial likelihood of irreparable misrepresentation. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

From the motion and supporting brief it appears that:

(1) the complaint states a cause of action, the court had jurisdiction of the subject matter and the person of the defendant, and defendant was competently represented by appointed counsel; (2) no reversible error occurred during the trial; (3) there is ample evidence sufficient to support the jury's verdict; (4) the sentence imposed is within the penalty provided by statute and in view of the nature and circumstances of the offense and defendant's record of two prior convictions, the sentence cannot be deemed excessive. See People v. Wenzel, 3 Ill. App.3d 941, 277 N.E.2d 141 (3d Dist., 1971).

We agree that there are no arguable errors to be considered on appeal and that continuance of this appeal could not possibly result in success and would be wholly frivolous.

For the reasons stated the action of the Circuit Court of Will County in this cause is affirmed and the motion of the State Appellate Defender to withdraw as counsel for defendant Clarence McCallum is allowed.

Judgment affirmed and withdrawal motion allowed.



Bar Assn

3D

30 I.A. 546

3D

30 I.A. 540

74-240

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable WILLIAM L. GUILD, Justice  
Honorable ALBERT E. HALLETT, Justice  
LOREN J. STROTZ, Clerk  
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:  
On July 17, 1975 the Opinion of the Court was filed  
in the Clerk's office of said Court, in the words and figures  
following, viz:



FILED

JUL 17 1975

No. 74-240

LOREN J. STROTZ, Clerk  
Appellate Court, 2nd District

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FIRST DIVISION

Abstract

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. ) Appeal from the Circuit  
 ) Court for the 16th Judi-  
 ) cial Circuit, Kane  
JOHN CRESSON, ) County, Illinois.  
 )  
Defendant-Appellant. )

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant was convicted on one count of burglary in McHenry County<sup>1</sup> and on one count of burglary in Kane County, pursuant to plea negotiations. He was sentenced to concurrent terms of 1-5 years on each of the separate convictions. Defendant appeals, contending that he did not waive his constitutional right to a jury trial intelligently and voluntarily when he pled guilty to the charges.

Defendant appeared before the court on February 17, 1973, when he waived his right to a preliminary hearing. At that time he was advised by the court in express terms of his right to a trial by jury. At his arraignment in Kane County on March 2, 1973 when he pled not guilty, he was again in express terms told of his right to a jury trial. When defendant was again before

<sup>1</sup> The McHenry County charge was transferred to Kane County on notification by the defendant that he desired to plead guilty to the charges in the latter county, pursuant to Ill.Rev.Stat. 1973, ch. 38, par. 1005-4-2(b).

the court on his request to change his plea on the Kane County charges on September 20, 1973, he concedes that the judge informed him of his various rights under Supreme Court Rule 402 (Ill.Rev.Stat. 1973, ch. 110A, par. 402), but denies that he understandingly and voluntarily waived his right to a jury trial.

The court did not on the occasion of the acceptance of the negotiated plea expressly use the word "jury" in his admonishment. The following colloquy, however, appears of record.

"THE COURT: And do you understand that if you plead guilty there won't be any trial, there won't be any witnesses called, and you have the right to call witnesses in your own behalf? You understand that?

THE DEFENDANT: Yes.

THE COURT: Do you want to waive all of those rights? Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And by waiving those rights, you lose your presumption of innocence and admit that you voluntarily entered this plea of guilty; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is there any doubt about it? Now, have we touched all of the bases, Mr. State's Attorney?

MR. FLANAGAN: Other than to make clear, your Honor, just exactly what the State's agreement with Mr. Cresson was, and that is simply that -- I believe Mr. Banbury touched on it earlier -- that we will nolle pros two cases, 73 CF 1560 and 1561, but that we are entitled under the terms of the agreement to use those in aggravation at the sentencing hearing on the charge of 73 CF 1518.

Is that the agreement, Mr. Banbury?

MR. BANBURY: That is my understanding.

THE COURT: Have you explained that to Mr. Cresson?

MR. BANBURY: Yes, I have, your Honor.

THE COURT: Do you understand that, Mr. Cresson?

THE DEFENDANT: Yes, sir.

THE COURT: And is that agreeable to you?

THE DEFENDANT: Yes, your Honor."

Following the transfer of the burglary case from McHenry County and during the subsequent change of plea proceeding on October 15, 1973, the following colloquy appears of record.

"THE COURT: And you appreciate that on this case involving Larry Weisz, or Larry's Arco Service Station, on the 11th of January, 1973,

that you are presumed to be innocent and the burden of proof is on the State to prove by competent evidence that would satisfy a Jury or a Judge that you are guilty and that proof has to be beyond a reasonable doubt or to a moral certainty? You understand that?

THE DEFENDANT: Yes,

THE COURT: And do you understand your presumption of innocence?

THE DEFENDANT: Yes.

THE COURT: And the right to call witnesses in your own behalf?

THE DEFENDANT: Yes.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, yes.

THE COURT: And if you desire to plead guilty, you waive those Constitutional rights and you waive the right to have a change of Judges; do you understand that?

THE DEFENDANT: Yes.

THE COURT: And knowing all that, you do want to plead guilty to this burglary of Larry's Arco Service Station on January 11th in McHenry?

THE DEFENDANT: Yes."

In each instance in the court's presence defendant read a written plea of guilty form in which he expressly gave up the right to a jury trial. Defendant further admitted for the record that he signed the document freely and voluntarily.

Defendant argues, however, that the record does not show that he rejected his right to be tried by a jury and that he did so understandingly and voluntarily after interrogation by the court. We conclude that the record, to the contrary, shows substantial compliance with Supreme Court Rule 402(a)(4). Ill.Rev.Stat. 1973, ch. 110A, par. 402(a)(4). See People v. Price (1973), 9 Ill.App. 3d 693, 695.

To have fully and technically complied strictly with Supreme Court Rule 402(a)(4) the judge should have directed the defendant's attention again upon his change of pleas to his right to a jury trial in express terms and by further interrogation have secured a particular statement from defendant showing his understanding waiver. It is now clear, however, that every deviation from the strict compliance with Supreme Court Rule 402 does not require reversal when the record shows, as it does here, that the pleas of

guilty were voluntarily and understandingly entered by a defendant who was under no disability, no stranger to criminal prosecutions, and who has never claimed that the plea bargaining agreement was not honored. People v. Ellis (1974), 59 Ill.2d 255; People v. Warship (1974), 59 Ill.2d 125, 129; People v. Krantz (1974), 58 Ill.2d 187, 194. Also People v. Dudley (1974), 58 Ill.2d 57, 60-61.

We therefore affirm the judgment of the trial court.

Affirmed.

GUILD and HALLETT, JJ. concur.



Bar Usan  
3D  
30 I.A. 546

3D  
30 I.A. 545

75-25  
UNITED STATES OF AMERICA

State of Illinois       )  
Appellate Court       ) ss:  
Second District       )

At a session of the Appellate Court, begun and held  
at Elgin, on the 2nd day of December, in the year of our Lord  
one thousand nine hundred and seventy-four, within and for  
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable WILLIAM L. GUILD, Justice  
Honorable ALBERT E. HALLETT, Justice  
LOREN J. STROTZ, Clerk  
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:  
On        July 30, 1975        the Opinion of the Court was filed  
in the Clerk's office of said Court, in the words and figures  
following, viz:



Barless

3D

201 A 646

No. 75-25

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FIRST DIVISION

Abstract

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the Circuit
	)	Court for the Fifteenth
v.	)	Judicial Circuit, Carroll
	)	County, Illinois.
GARY L. CRETE,	)	
	)	
Defendant-Appellee.	)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

The State appeals from a judgment in a post-conviction proceeding which reversed defendant's conviction of the offenses of aggravated assault and armed violence, and granted a new trial.

The trial court found that the defendant had not been advised of his right to appeal when he was sentenced on November 20, 1973, nor of his right to have a free transcript and counsel on appeal if indigent; that defendant was unaware of his right to appeal when he pursued Federal Habeas Corpus relief which was denied for failure to exhaust the State remedy by appeal; and that defendant became aware too late and as a result lost the right to appeal because of the time limitation under Supreme Court Rule 606(c) (Ill.Rev.Stat. 1973, ch. 110A, par. 606(c)). Under these circumstances the trial court concluded that the resulting prejudice to the defendant raised the issues to a constitutional level involving due process and to achieve a just

result, defendant was entitled to a new trial.<sup>1</sup>

The State contends that the failure to advise defendant of his statutory right to appeal (Ill.Rev.Stat. 1973, ch. 37, par. 32.1) as well as other procedural rights is not of constitutional magnitude and therefore not a subject of post-conviction relief, citing People v. Covington (1970), 45 Ill.2d 105, People v. Cox (1972), 53 Ill.2d 101, and People v. Feigleson (1975), 24 Ill. App.3d 794.

Alternatively, the State argues that if we do not reinstate the convictions that we consider the filing of the pro se post-conviction petition on June 14, 1974, as a late notice of appeal within the additional 6 month time period provided under Supreme Court Rule 606(c) (Ill.Rev.Stat. 1973, ch. 110A, par. 606(c)), thus providing a review of errors which may be alleged rather than a new trial.

The substance of defendant's claim of prejudice is the deprivation of his right to appeal. The proper remedy would therefore be to now permit the defendant to appeal, if this result is within our powers. We believe that it is.

The pro se petition, while in form a request for post-conviction relief, in substance complained of the denial of a right to appeal. We therefore will consider that the petition which evidenced a desire to appeal was, in substance, a petition to file a late notice of appeal. We now grant leave to file the late notice

---

1 Although it is not entirely clear it fairly appears that the proceedings below were taken by a court reporter but that the transcript was not available at the time of the post-conviction hearing because it had not been written up. We have been informed in oral argument that apparently the court reporter had retired and the notes had not been transcribed. In any event, the record does not demonstrate that a report of proceedings of sufficient completeness under Supreme Court Rule 323 (Ill.Rev.Stat. 1973, ch. 110A, par. 323) is unavailable. This distinguishes People v. Seals (1973), 14 Ill.App. 3d 413, 414, cited by defendant.

of appeal under the provisions of Supreme Court Rule 606(c). See Morris v. United States (5th Cir. 1974), 503 F.2d 457. Cf. People v. Brown (1968), 39 Ill.2d 307, 311; People v. Aliwoli (1975), \_\_\_ Ill.2d \_\_\_, 328 N.E.2d 555; People v. Miner (1972), 4 Ill. App.3d 409, 411.

We therefore reverse the order granting a new trial and remand the cause with directions to reinstate the judgments of conviction. The clerk of this court is ordered to transmit a notice of appeal under the date of June 15, 1974 to the trial court for filing, following which defendant may proceed with the direct appeal of his conviction.

Reversed and remanded with directions.

GUILD and HALLETT, JJ. concur.



74-98

3D  
30 I.A. 550

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 2nd day of December, in the year of our Lord  
one thousand nine hundred and seventy-four, within and for  
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice

Honorable WALTER DIXON, Justice

Honorable THOMAS J. MORAN, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On August 4, 1975 the Opinion of the Court was filed  
in the Clerk's office of said Court, in the words and figures  
following, viz:





No. 74-98

**Abstract**

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
SECOND DIVISION

**FILED**

AUG 4 - 1975

**LOREN J. STROTZ, Clerk**  
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the Circuit Court
	)	for the 16th Judicial Circuit,
EUGENIA STRATTON,	)	DeKalb County, Illinois.
	)	
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant was convicted by a jury of attempted murder, aggravated battery and aggravated assault. On the State's motion the charges of aggravated assault and aggravated battery were dismissed. Following a sentencing hearing defendant was sentenced to a term of not less than 4 nor more than 5 years in the Department of Corrections. On appeal she contends she was denied due process because the trial court received, over objection, evidence of defendant's prior burglary conviction for the purpose of impeaching her credibility as a witness.

The State's principal witness was the victim, the defendant's step-father, John Tarlton. He testified that on the morning of February 7, 1973, he had a conversation with defendant about \$30 which he had placed on top of the refrigerator for insurance money. He asked defendant to return it. When she refused he slapped her four or five times. Defendant then gave him \$20 but refused to give back the other \$10. He then told her that if she did not do so when he got back he would call the Sheriff. When he returned with his wife defendant

gave him the \$10 and told him the mail had arrived. He went to get the mail and when he was returning she shot him in the back. Mr. Tarlton admitted that on a previous occasion he was arrested after slapping and shoving defendant; that he pleaded guilty and paid a fine. On cross-examination he denied threatening to kill defendant.

A neighbor, Judith Westphall, testified for the State that defendant came to her home asking to use the phone. After calling the Sheriff's office and reporting that she had "just shot my step-father", defendant explained to the witness that she had shot her step-father when he accused her of taking \$10; that he had beaten her up and she couldn't take it any longer; that defendant was worrying about what Tarlton might do to the baby and she did not care if she had killed him. The witness described defendant's face as having red marks on it and <sup>said</sup> that defendant's hands were shaking and the marks made the witness believe that defendant had been struck about the face.

Detective Munch of the DeKalb County Sheriff's Police testified for the State to receiving the telephone call from the defendant and described the scene at defendant's home. He also testified concerning his conversation with defendant after advising her of her constitutional rights. Defendant showed him bruises on her right hand which she said were inflicted by her step-father when he beat her and related to <sup>the witness</sup> / the events leading up to the shooting.

Detective Garrett was another State's witness. He testified that Tarlton told him at the hospital that he had boxed defendant's jaws on the morning of February 7.

In her own defense defendant testified that on the morning of February 7, 1973, when she and her baby were the only ones at

home, her step-father came in and made an indecent demand upon her which she refused. She ran away and he chased her into the bathroom. He started beating and slapping her, mostly on the head, for about five minutes. She thought he was going to rape her. She kept screaming and he finally quit beating her. A little later that morning Tarlton started complaining that she should pay him back \$10 which was still missing out of the \$30 insurance money or he would kill her. (Defendant admitted taking the \$20 but insisted she had "borrowed" it, and had repaid it to him.) He threatened many times that he would kill her and he started to beat her again. Finally, as he was leaving to pick up defendant's mother he again threatened that if defendant didn't have the money when he got back he would kill her. When Tarlton left, defendant pried open a chest where Tarlton kept his guns, took out a pistol and loaded it with three bullets, after determining by firing two kinds of shells through the bathroom window which ones fit the pistol.

She testified further that when Tarlton and her mother returned she gave her step-father \$10 and told him the mail had arrived. As Tarlton was returning with the mail she went outside and fired one shot hitting him in the back. She did not fire the other two cartridges. She then ran to a neighbor's home and called the Sheriff's office. When the police picked her up she showed them where she had thrown the gun. She further testified that she shot her step-father "because I was scared of him, that maybe he might kill me", and "he might hurt my baby".

Her mother, Mrs. Tarlton, testified that when her husband picked her up he was fussing about the money and said several times that when he got home he would kill the defendant. When they did get home Tarlton demanded the money from the defendant (and received it from her). Tarlton also threatened to kill Mrs. Tarlton.

The witness also testified that Tarlton was very hot tempered and "gets mad and real violent or something at least once a week or more."

The trial court having overruled defendant's pre-trial motion to exclude testimony regarding defendant's prior conviction for burglary, allowed the Chief Deputy Circuit Clerk for DeKalb County to read to the jury a copy of her prior conviction including the indictment charging her in Count I with burglary in Malta, Illinois, on March 25, 1972, and the judgment entered on June 9, 1972, based on a negotiated plea of guilty to that count.

The trial court's instructions included the following:

"Any evidence which was received for a limited purpose should not be considered by you for any other purpose."

"Evidence of the defendant's previous conviction of a crime is to be considered by you only insofar as it may effect her credibility as a witness, and must not be considered by you as evidence of her guilt of the crime with which she is charged."

Defendant concedes that the applicable statute

(Ill. Rev. Stat. 1971, ch. 38, par. 155-1) allows introduction of prior convictions into evidence for purposes of impeachment. However, she contends that her constitutional right to testify in her own behalf is unreasonably burdened by the fear of having her prior conviction introduced at trial and that the Illinois statute is at odds with her constitutional right to due process. She relies on People v. Santiago, 492 P. 2d 657, 661, in which the Hawaii Supreme Court held that "to convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused's constitutional right to testify in his own defense." She argues that in the case at bar the jury's knowledge of her prior conviction of burglary--

an offense which had nothing to do with the use of force and intending to lie under oath--made it more difficult for the jury to consider the issue which defendant sought to present to them, namely: Whether defendant's use of force on her step-father was reasonable under the circumstances.

A similar argument was rejected in People v. Beck, 133 Ill. App. 2d 356, 359, where the court said:

"While it is true that an accused has the right to present his version of the facts to the jury, the jury is entitled to know those factors which render his credibility suspect. One such factor is the witness's record of convictions for infamous crimes." (133 Ill. App. 2d 359.)

In McGautha v. California, 402 U.S. 183, 215, the United States Supreme Court also indicated that the use of prior convictions to impeach a defendant-witness does not exact a penalty on his right to testify in his own behalf. There the court said:

"It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. [Citations.] Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify."

Both the relevant Illinois statute and the rule laid down in People v. Montgomery, 47 Ill. 2d 510, make it clear that <sup>the</sup> admission <sup>into</sup> / evidence of prior convictions for the purpose of impeaching the witness lies within the sound discretion of the trial court. Therefore, the trial court was within its discretion in allowing into evidence the defendant's prior conviction.

For the foregoing reason, its judgment is affirmed.  
Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., CONCUR.





73-415

30 I.A. 561 <sup>3D</sup>

UNITED STATES OF AMERICA

State of Illinois     )  
Appellate Court     )   ss:  
Second District     )

At a session of the Appellate Court, begun and held  
at Elgin, on the 2nd day of December, in the year of our Lord  
one thousand nine hundred and seventy-four, within and for  
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice

Honorable WALTER DIXON, Justice

Honorable THOMAS J. MORAN, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On       August 6, 1975       the Opinion of the Court was filed  
in the Clerk's office of said Court, in the words and figures  
following, viz:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
SECOND DIVISION

FILED

AUG 6 - 1975

LOREN J. STROTZ, Clerk  
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. ) Appeal from the Circuit Court  
 ) for the 17th Judicial Circuit,  
ARTHUR RIEFFER, ) Winnebago County, Illinois.  
 )  
Defendant-Appellant. )

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant was indicted, together with one Jesse Long and Richard Whiteaker, for rape, aggravated kidnapping and armed robbery. Thereafter, the defendant appeared with the Public Defender to enter pleas of guilty to rape and aggravated kidnapping pursuant to a negotiated plea which proposed sentences of 4 to 20 years for each offense to run concurrently, and the armed robbery charge would be dismissed. The trial court interrogated and admonished the defendant as to the minimum and maximum sentences for each offense and carefully defined the term "indeterminate" (which defendant said he understood). The court also admonished him as to his other rights. Defendant then stated he was pleading guilty because he was guilty as charged. To establish a factual basis for the pleas the prosecutor examined the defendant who also acknowledged a written statement in which he related the details of the offense committed by him and his co-defendants. This statement he had voluntarily given to the police officers.

In his original brief in this court defendant's sole contention was that the trial court failed to comply with Supreme Court Rule 402(a)(2) (Ill. Rev. Stat. 1973, ch. 110A, par. 402(a)(2) )



relating to maximum and minimum sentences prescribed by law, because the admonition did not point out to defendant the mandatory parole term of 5 years in addition to the penitentiary sentence required for Class 1 felonies under Section 5-8-1 of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1).

We are aware of the recent Illinois Supreme Court case of People v. Wills, 61 Ill. 2d 105, in which the court states:

"We have reconsidered the position taken in People v. Krantz, 58 Ill. 2d 187, 195, and hold that compliance with Rule 402(a)(2) requires that a defendant be admonished that the mandatory period of parole pertaining to the offense is a part of the sentence that will be imposed and that he can be held subject to the jurisdiction of the Parole and Pardon Board for a period of time equal to the maximum term of imprisonment provided in the indeterminate sentence and the parole term. See Ill. Rev. Stat. 1973, ch. 38, par. 1003-3-10(a)." (61 Ill. 2d 109.)

However, in the Supplemental Opinion upon Denial of Petitions for Rehearing (People v. Wills, 61 Ill. 2d 105, 111, the Supreme Court said:

"We consider next the question whether our holding that compliance with Rule 402(a)(2) requires that a defendant be admonished with respect to the mandatory period of parole pertaining to the sentence to be imposed should apply retroactively or prospectively. In People v. Ellis, 53 Ill. 3d 390, 394, we considered whether 'a new pronouncement or standard for testing the constitutional prohibition against unreasonable searches and seizures' was to apply retroactively or only prospectively, and set forth the criteria for deciding the question. Although the procedural change here effected involves no constitutional issue or standard, the same criteria are applicable. We hold that the requirement of the admonition concerning the period of mandatory parole applies prospectively to guilty pleas taken subsequent to May 19, 1975." (Emphasis supplied.) (61 Ill. 3d 111.)

In the instant case the guilty plea was taken and the defendant was sentenced on August 30, 1973, approximately twenty-one months before May 19, 1975. At that time compliance with Rule 402(a)(2) required only that the judge explain the actual sentence to jail or imprisonment.



# 73 415

-3-

Therefore, defendant's contention relative to not having been completely and adequately informed under Rule 402(a)(2) is without merit.

By supplemental brief, filed by leave of court, defendant contends that the trial court's admonition as to the nature of the charges was insufficient under Rule 402(a)(1). He argues that a verbatim reading of the indictment by the trial court was inadequate. The record here discloses that defendant's written statement was received in evidence. In addition to defendant's testimony, the prosecutor informed the court that the evidence would show that the complainant did not consent to the sexual intercourse, that she was threatened by the use of a shotgun during the act, and was transported and secretly confined in the automobile during the course of these events. In response to the court's inquiry the defendant stated that these statements were correct and having executed a written plea of guilty and waiver of trial by jury, he still persisted in his guilty plea. The record thus shows that the trial court satisfied the requirements of Rule 402 in informing the accused of, and determining that he understood, the nature of the charge against him. People v. Krantz, 58 Ill. 2d 187, 193; People v. Diaz, 15 Ill. App. 3d 280, 284; see also People v. Doyle, 20 Ill. 2d 163, 167.

Defendant further contends that the convictions for aggravated kidnapping and rape are multiple convictions arising out of a single transaction, requiring that the lesser conviction, aggravated kidnapping, be vacated. Under the circumstances here both offenses are separable. Defendant (and his companions) could have taken the complaining witness into the nearby field and raped her; instead, they forced her into the automobile and drove her around for sometime before defendant and the others committed the acts of sexual intercourse. In People v. Canale, 52 Ill. 2d 107, the Supreme Court



# 73 415

-4-

upheld convictions for rape and aggravated kidnapping where the complaining witness was driven from home for forty-five minutes and then confined in the area where she was raped. See also People v. Pardue, 6 Ill. App. 3d 430 and People v. Jones, 6 Ill. App. 3d 669.

The judgments of the trial court are therefore affirmed.  
Judgments affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.





Barless

3D

30 I.A. 646



No. 61543

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
TERRANCE LEWANDOWSKI, )  
 )  
Defendant-Appellant.)

APPEAL FROM THE  
CIRCUIT COURT OF  
COOK COUNTY  
  
HONORABLE  
JOSEPH R. GILL,  
PRESIDING.

BEFORE Barrett, P.J., Sullivan and Lorenz, JJ.  
PER CURIAM (First District, Fifth Division)

Defendant was found guilty after a bench trial of the crime of battery (Ill. Rev. Stat. 1973, ch. 38, par. 12-3.) and was sentenced to a term of ninety days in the House of Correction.

Defendant wished to appeal and the State Appellate Defender was appointed to represent him. After examining the record, the State Appellate Defender has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief states that the only possible arguments which could be raised on appeal are that defendant did not knowingly and understandingly waive his right to a trial by jury and that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt. The brief in effect concludes that an appeal on these issues would be wholly frivolous and without merit. Copies of the motion and brief were mailed to the defendant on April 14, 1975. He was informed that he had until June 24, 1975, to file any additional points he might choose in support of his appeal. He has not responded.

At trial Hugh O'Donnell testified that at approximately 8:00 P.M. on November 22, 1973, he was talking with two friends at the Eugene Field Park when they were approached by the defendant and a second man. Defendant asked for some money so he could get high. O'Donnell testified that he gave defendant some money hoping he would leave. The defendant



accused one of O'Donnell's companions of stealing a mini-bike belonging to one of defendant's friends. O'Donnell's companion denied the theft. Defendant then struck O'Donnell in the face, knocking him to the ground, and that as he was looking for his glasses which were knocked off in his fall, the defendant kept striking him. Defendant then fled the scene. A short time later several police officers arrived and O'Donnell told them what had occurred.

Chicago Police Officer Quillinan testified that at approximately 8:30 P.M. on November 22, 1973, he responded to a call and went to the Eugene Field Park and talked to Hugh O'Donnell who stated that he had been involved in a fight. O'Donnell was placed in the squad car and taken on a tour of the area to see if he could identify the offenders. Richard Thomas was placed under arrest after being identified by O'Donnell as one of the offenders. After returning to the station, Officer Quillinan heard a call of a criminal damage to property in progress in the park. He gave the police officers who were responding to the call the description of the offender wanted in his case. At approximately 9:00 P.M. those officers returned to the station with the defendant in custody.

Defendant testified that on November 22, 1973, he was walking his dog in the Eugene Field Park when he was harrassed by several men who began to hit him. The men ran when defendant's dog started to attack them. He denied seeing O'Donnell in the park and denied ever striking O'Donnell. He further testified that as a result of the occurrence he had cuts over both eyes and was treated at Belmont Hospital.

The first possible argument which could be raised on appeal is that the defendant did not knowingly and understandingly waive his right to a trial by jury. In People v. Sailor, 43 Ill. 2d 256, 253 N.E.2d 397, the Illinois Supreme Court held that a defendant normally speaks through his attorney and that by permitting his attorney in his presence or without objection to waive the right to a jury trial, the defendant acquiesces and is bound by his attorney's conduct.

In the case at bar the record reflects that when defendant's



case was called, privately retained counsel in defendant's presence stated, "We're ready for trial, waiving jury trial at this time." Thereafter the trial judge inquired as to whether it would be a bench or a jury trial and defense counsel again in defendant's presence replied, "Bench." Defense counsel then tendered to the trial court a jury waiver signed by the defendant. Upon this record we conclude that the statements of privately retained defense counsel made in defendant's presence without any objection were sufficient to constitute a valid jury waiver binding upon the defendant.

The second possible argument which could be raised on appeal is that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt. The rule is well established that in a bench trial the credibility of witnesses is for the trial judge to determine and his determination will not be disturbed on review unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt. (People v. Clark, 52 Ill. 2d 374, 288 N.E.2d 363; People v. Holmes, 6 Ill. App. 3d 254, 285 N.E.2d 561.) The testimony of a single witness is sufficient to sustain a conviction if positive and credible even though contradicted by the accused. People v. Abrams, 21 Ill. App. 3d 734, 316 N.E.2d 5; People v. Garmon, 19 Ill. App. 3d 192, 311 N.E.2d 299.

In the case at bar the testimony of Hugh O'Donnell was positive and credible. His testimony established that while talking with several friends in the park he was approached by the defendant who asked for money. O'Donnell acquiesced to defendant's request. Thereafter defendant accused one of O'Donnell's companions of theft. The defendant then approached O'Donnell and struck him in the face. While O'Donnell was on the ground the defendant struck him repeatedly. Defendant's testimony at trial in which he denied the offense does not create a reasonable doubt as to his guilt since the trial judge is not obliged to believe a defendant's testimony. (People v. Lahori, 13 Ill. App. 3d 572, 300 N.E.2d 761.) After hearing all of the testimony adduced at trial the trial judge found the evidence sufficient to establish defendant's guilt beyond a reasonable doubt. After a complete



review of the record we cannot say that his determination was erroneous.

We have examined the record and concur in the opinion of the State Appellate Defender that none of the arguments thus raised has substantial merit. The record does not disclose any additional possible grounds for an appeal which are also not frivolous. The State Appellate Defender's motion for leave to withdraw as counsel on appeal is granted. The judgment of the circuit court of Cook County is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]





3D  
30 I.A. 656



60827

PEOPLE OF THE STATE OF ILLINOIS, )  
Plaintiff-Appellee, )  
v. )  
JOSE FIGUEROA, )  
Defendant-Appellant. )

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

HONORABLE  
CHESTER J. STRZALKA,  
Presiding.

PER CURIAM:

Before McGLOON, P.J., McNAMARA and MEJDA, JJ.

The defendant, Jose Figueroa, appeals from an order entered after a hearing on April 9, 1974, revoking his probation and sentencing him to a term of one year to one year and a day in the Illinois State Penitentiary for violating the anti-theft laws. (Ill. Rev. Stat. 1973, ch. 95-1/2, par. 4-103(a).) On appeal defendant contends:

- 1) The State failed to prove he violated a condition of probation;
- 2) The petition to revoke probation did not sufficiently allege that he violated any condition of probation; and
- 3) A police officer's testimony that a check of the registration showed the automobile in question was registered to one Faith Meadows was hearsay and constituted reversible error.

The petition to revoke probation alleged in pertinent part:

"NOW COMES BERNARD CAREY, State's Attorney of Cook County, by John F. Glenville, Assistant State's Attorney, and gives the Court to be informed and understand that one Jose Figuerda [sic] was heretofore on November 14, 1973 convicted of Auto Theft and was admitted to probation by your Honor on said charge for a period of one year.

"Petitioner further shows that Jose Figuerda [sic] violated the terms of his probation in that on February 18, 1974, he was arrested by Chicago Police and charged with the offense of Grand Theft and tampering.\*

\*

The italicized words are written in longhand and the rest of the petition is typewritten; the record is silent concerning when the handwritten words were added.



"The facts show that the arresting officers responding to a radio assignment of a theft in progress, arrived on the scene and observed the defendant along with three others engaged in the process of removing parts from a late model auto. A Check was run on the vehicle and it was found that the auto had been reported stolen in Skokie, Illinois.

"The Petitioner further states that the allegations in this petition are a violation of the conditions of probation under Chapter 38, Section 1005-6-3 of the Illinois Unified Code of Corrections of 1973."

The arresting officer, Michael Chasen, testified that on February 18, 1974 he observed a 1968 gold Chevrolet Camaro[which a subsequent registration check showed belonged to Faith Meadows] parked beside a 1966 Ford Mustang. One person was behind the wheel of the Camaro and three people were removing something from under the hood. In court the officer identified the defendant and one Denic as two of the men he saw looking under the hood. As he left his car the men dropped various automobile parts they had in their hands and backed away from the car, at which time he arrested them. The ignition was missing from the Camaro, various parts of the engine had been removed, the door was open and the hood was raised. The Mustang was parked adjacent to the Camaro and its open trunk contained several tools and an open tool box. Some tools were lying next to the Camaro and Denic said they were his. Faith Meadows testified that she owned a 1968 Camaro which she first discovered was missing from in front of her house on January 28, 1974. She did not have the title for the car at the trial since she had turned it over to the insurance company.

Defendant testified that he was in the parking lot helping his friend Drugan Denic fix his Mustang which had developed trouble. He denied that he touched or went into the 1968 Camaro at any time or took anything from it. He claimed the Chevrolet had no hood and that both the trunk and hood of the Mustang were up. He and Denic told the officer they were "fixing" Denic's car.



Drugan Denic testified that he owned the Mustang and that its hood was open so they could fix some trouble they had with it. The windows on the Camaro were all broken; he couldn't tell what the color was; there was no hood on the car; the engine was taken apart and it was "just sitting there" looking like a broken down car. He told the officer he was working on his car. In rebuttal, Officer Chasen testified that Denic had told him at the scene that a man, not known to him, told him he could remove whatever he wanted off the Camaro; that the hood was up on the Camaro and the hood of the 1966 Mustang was down.

It is now settled that a person who is the subject of a probation revocation proceeding is entitled to written notice of the claimed violations of probation so that he may determine whether or not he has "committed the alleged violation of the conditions upon which he is at liberty." (Gagnon v. Scarpelli (1972), 411 U.S. 778, 786, 790.) Citing People v. Tempel (1971), 131 Ill.App. 2d 955, 268 N.E. 2d 875, defendant argues that the Criminal Code does not contain offenses such as grand theft and tampering, and that the allegation therefore failed to inform him of the nature and elements of the offense the State would have to prove in order to show he had violated the terms of his probation. He also contends that the complaint was not sufficiently specific since it did not specify the date of the offense, where it took place, and did not describe the make, model and year of the automobile in question.

It is reasonable to infer from the petition that the offense occurred on February 18, 1974, the date of the arrest. Since the petition alleged that the vehicle was reported stolen and that the defendant was removing parts from it, sufficient facts were stated to put the defendant on notice that he was being charged with a violation of the Illinois Theft Statute in that he was, without authority, exercising unauthorized control over the parts of the automobile, intending to permanently deprive



the owner of that property. People v. Tempel, supra, cited by defendant, states that a probationer is entitled to notice sufficient to inform him as to the nature of the conduct alleged to constitute the grounds for revocation, but that the notice need not identify the alleged conduct "with the same specificity as is required of an indictment or an information." See also People v. Melson (1974), 19 Ill.App. 3d 438, 311 N.E. 2d 763.

In the instant case the defendant and another witness testified on his behalf. Their testimony was in contradiction to that of the police officer, and it is clear from the conduct of defense counsel that it was understood the charge was one of theft. For example, in closing argument, defense counsel referred to the charge as "stripping" a vehicle. Ill. Rev. Stat. 1973, ch. 38, pars. 1005-6-3(a)(1), referred to in the petition to revoke probation, provides that one condition of probation shall be that the person "not violate any criminal statute of any jurisdiction." The term "grand theft" has a commonly accepted meaning; namely, a violation of the Illinois theft statute in which the value of the property exceeds \$150 (Ill. Rev. Stat. 1973, ch. 38, pars. 16-1(a)(1), 16-1(e)). (See People v. Harwell (1947), 398 Ill. 369, 373, 75 N.E. 2d 889.) The petition specifically alleged that at the time of his arrest the defendant was observed "with three others engaged in the process of removing parts from a late model auto" which had been reported stolen. Under these circumstances, the defendant was adequately apprised that he was being charged with a violation of the Illinois theft statute, and the petition sufficiently detailed his alleged conduct.

The standard of proving a violation in a hearing to revoke probation is proof by a preponderance of the evidence. (People v. Crowell (1973), 53 Ill. 2d 447, 292 N.E. 2d 721.) Officer Chasen testified that when he arrived at the scene the defendant was one of three people who were working under the hood of the 1968 Camaro and one of the men who dropped various parts of the automobile. He also testified that various parts





of the engine had been removed. The officer's testimony was believable even though it was contradicted by the defendant and Denic. There was sufficient evidence from which the trier of fact could have concluded that the defendant had committed the offense of theft of an item under the value of \$150 or that he had attempted such a theft. Ill. Rev. Stat. 1973, ch. 38, pars. 16-1(a)(1) and 8-4.

The petition also alleged that defendant was charged with the offense of "tampering." The Illinois Vehicle Code, in a section entitled Offenses Relating to Motor Vehicles and Other Vehicles-Misdemeanors, provides that it is a violation for a person to "tamper with a motor vehicle" without authority to do so. (Ill. Rev. Stat. 1973, ch. 95-1/2, par. 4-102(b).) The evidence did show that the defendant was caught "tampering" with the vehicle since he was one of three men working under the hood and who dropped various parts they had in their hands when the police arrived.

Finally, defendant contends that Officer Chasen's testimony—that he checked the license plates of the 1968 Chevrolet and found the vehicle was registered to Faith Meadows—was inadmissible hearsay, citing People v. Carpenter (1963), 28 Ill. 2d 116, 121, 190 N.E. 2d 738. The State, however, contends that this testimony comes within an exception to the hearsay rule, and cites People v. Fair (1965), 61 Ill.App. 2d 360, 366, 210 N.E. 2d 593, in which an arresting officer was allowed to testify to the inspection date on a decalcomania issued by the Department of Agriculture that the scale had been recently tested. There the court held that although the testimony was technically hearsay it came within the public document exception.

In the instant case the State's direct examination of Officer Chasen concluded with the following:

Q. [By Mr. Lee, Assistant State's Attorney]: And, Officer, did you check the license plates of that 1968 Chevrolet?

A. I did.



Mr. Miranda [Counsel for defendant]: I object.

The Court: Your objection is overruled.

Mr. Lee: Who was registered to that car?

Mr. Miranda: I object, it is hearsay.

The Court: Overruled.

The Witness: A. The car was registered to Faith Meadows.

The violation of probation may be proved only by competent evidence (People v. Collins (1973), 14 Ill.App. 3d 446, 302 N.E. 2d 709) and cannot rest on suspicion or speculation. (People v. Young (1970), 125 Ill.App. 2d 154, 259 N.E. 2d 834, rev'd on other grounds after remand, 14 Ill.App. 3d 595, 302 N.E. 2d 669.) Although a probation revocation hearing is not a criminal proceeding, the deprivation of liberty which is a possible consequence requires that the evidence of violation be clear and convincing. (People v. Arroyo (1969), 112 Ill.App. 2d 480, 483, \_\_\_\_ N.E. 2d \_\_\_\_.)

The evidence as to Officer Chasen's check of the license plates was limited to the above testimony. Unlike Fair, the officer here did not testify as to what check had been made or the source of any information he may have obtained thereby. There was no evidence that any public or other document had been relied upon. The source of the officer's information is left to speculation or surmise. If the public records had been relied upon, a copy of the records of the Secretary of State, certified under his signature and seal, as to license plates and the identities of the owners of motor vehicles, would be admissible in evidence as an exception to the hearsay rule. (See People v. Manikas (1969), 106 Ill.App. 2d 315, 246 N.E. 2d 142.) The trial court erred in overruling the objection to the testimony. Since there is no competent evidence in the record to establish that Faith Meadows' automobile was the one Officer Chasen saw in the parking lot, there is a failure of proof that the defendant acted "without authority" as to the car seen by the officer.

For the reasons given, the judgment of the circuit court is reversed.

Reversed.



Bar Assn

30 I.A. 693



60688

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
v.	)	
	)	HONORABLE
LEWIS MONROE,	)	MARVIN E. ASPEN,
	)	PRESIDING.
Defendant-Appellant.	)	

Mr. JUSTICE EGAN delivered the opinion of the court:

The defendant, Lewis Monroe, was found guilty after a bench trial of possession of less than 30 grams of heroin and sentenced to two to six years.

Investigator Gordon Frierson, a member of the Cook County Sheriff's Police Department went with Investigators Robbie Grace and Fred Graca to 13972 South Grace, in Robbins, at approximately 1:30 p.m. on August 9, 1972, with a search warrant. They showed the warrant to Gwendolyn Orange, who opened the door to the apartment for them. Before they entered the apartment, the officers saw a man look out of a window at them. As the door was being opened, they heard the sound of a toilet flushing. The officers ran upstairs and, according to Frierson, he saw the defendant with a plastic bag in his hand in the toilet. Frierson reached into the bowl and retrieved the bag "before it was flushed down."

Frierson testified that he placed the wet bag into an evidence plastic bag and placed that in his pocket "upon leaving the wash-room." Graca testified that Frierson, after he retrieved the bag from the toilet, "took out a plastic evidence bag in his pocket and put the bag that he had gotten from the toilet bowl into the larger plastic bag." When Frierson arrived at the Sheriff's station he removed the bag which he described as "like a sandwich bag" and placed it in an inventory envelope, which he sealed and took to the Chicago Crime Detection Laboratory. He also submitted a small knife and bottle cap which he recovered from a bedroom.



A Chicago Police Department chemist, Dr. V. S. Vasan, testified that he examined the white powdery contents of a plastic bag. He described the powder and the bag as being "very wet and soaking." He analyzed the powdery substance as containing traces of heroin. He did not weigh the powdery substance because he was certain that it was less than 30 grams.

On cross-examination he testified that the little knife that had been submitted by Frierson was wet when he first saw it and at the time of trial it was "coated with powder." The following then occurred:

"Q. So if I had put a contaminated container such as this covered with a powder, and this, and it all got wet and you tested it you might find traces of heroin that came from these two objects; isn't that right?

"A. It probably was all contaminated. It was fairly contaminated, yes."

The defendant now argues that the knife and bottle cap were submitted to the Crime Laboratory in the same container as the wet bag recovered from the toilet; and, since the bottle cap and knife themselves could have contained traces of heroin, they could have contaminated the white powdery substance; the State, therefore, failed to prove beyond a reasonable doubt that the traces of heroin the chemist found were from the white powdery substance and not from the bottle cap and knife.

The defendant's argument depends upon his assertion that the evidence discloses that the People's Exhibit 5 was the evidence bag into which Officer Frierson placed the wet bag retrieved from the toilet and also the small knife and bottle cap.

The State argued in the trial court and in this court that the defendant has misconstrued the evidence and that the knife and bottle cap were placed in one bag; the wet bag was placed in another evidence bag; and then both bags were placed in People's Exhibit 5.

We do not believe that the record supports the defendant's interpretation of the evidence. The numbering and identification of





the exhibits are confusing; and the State conceded in oral argument it could not specify what numbered exhibit the wet bag itself was. The exhibits have not been filed in this court, but the impounding order entered after the trial lists and numbers three manila envelopes and four plastic bags. Frierson said that the evidence bag he placed the wet bag into was plastic and "like a sandwich bag." The impounding order shows that the People's Exhibit 5 is not a plastic bag but a three-inch by six-inch manila envelope. He also testified that he put the "particular two items in this envelope [People's Exhibit 5] and packaged each thing separately, as you can see." (Emphasis added.) When cross-examined, Frierson testified as follows:

"Q. Is this the package you grabbed?

"A. That package within, yes, the plastic package within here.

"Q. What package?

"A. There is another plastic bag in this plastic bag.

\* \* \*

"Q. What about the other things?

"A. I put them in separate bags."

And when Dr. Vasan was testifying the State's Attorney had the record reflect that Vasan was "referring to what has been marked as People's Exhibit Number 5 for identification purporting to be a smaller manila type envelope as the envelope in which he put the plastic envelopes upon finishing his chemical tests." (Emphasis added.)

The trial court saw the exhibits and apparently concluded that the State's interpretation of the evidence was correct. We believe the record justifies that conclusion.

The judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and SIMON, J. concur.

ABSTRACT ONLY.



61119

3D  
30 I.A. 694



PEOPLE OF THE STATE OF ILLINOIS, )  
Plaintiff-Appellee, )  
v. )  
PETER POTURALSKI, )  
Defendant-Appellant. )

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

HONORABLE  
ROBERT MASSEY,  
PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

The defendant, Peter Poturalski, was charged with armed robbery in indictment No. 73-250. After waiving a trial by jury, he was found guilty of that charge and sentenced to a term of 4 1/2 to 7 years in the penitentiary. A notice of appeal was timely filed.

Defendant's counsel, the public defender of Cook County, seeks leave to withdraw as counsel pursuant to Anders v. California (1967), 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396 on the grounds that there are no meritorious issues to be raised on appeal. Copies of counsel's motion and brief were mailed to defendant on April 15, 1975. He was further advised by this court on April 23, 1975 to file any points in support of his appeal that he might choose by June 23, 1975, after which date the court would fully examine all proceedings and decide whether the appeal is wholly frivolous. No response has been received from the defendant.

We have reviewed the record on appeal and the supplemental report of proceedings in this case. At trial, the complaining witness testified that two men armed with revolvers, wearing nylon stockings as masks and hats, entered the Custom Wig Shop at 4065 North Milwaukee Avenue in Chicago, Illinois, about 3 p.m. on April 19, 1972. Approximately \$182 was removed from the cash register and money was also taken from several patrons present at the time. The evidence further showed that defendant was arrested at the scene with a torn nylon partially



over his face a few minutes after the occurrence. He was identified by two eyewitnesses in a line-up shortly thereafter, and a search of his person revealed \$182.86 in his right front pants pocket. In view of this testimony, we concur with the opinion of counsel that there was sufficient evidence to support a conviction for armed robbery.

The only other possible issue to be raised on appeal, argues counsel, is whether defendant was denied his right to a speedy trial. The defendant had been granted bail on an Illinois charge when he was arrested for another crime and incarcerated in the federal prison at Terre Haute, Indiana. The Indiana arrest was made in June 1972. In July 1972, his bond on the Illinois charge was forfeited for non-appearance and, on February 2, 1973, the first defense motion for a continuance was made.

Defendant urged in a post-trial motion that, since a period in excess of 180 days had passed from July 15, 1972 to February 2, 1973, when he made his first motion for a continuance, he was denied a speedy trial and his conviction should be reversed. This contention is without merit. The statute provides:

"Every person in custody in this State for an alleged offense shall be tried by the Court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by defendant." (Emphasis supplied.) Ill. Rev. Stat. 1969, ch. 38, § 103-5.

This provision does not apply to persons who are not confined in Illinois while awaiting trial. People v. Moriarity (1966), 33 Ill. 2d 606, 213 N.E. 2d 516; People v. Terlikowski (1967), 83 Ill. App. 2d 307, 227 N.E. 2d 521.

In view of the foregoing, we agree with the public defender that there are no issues to be raised in this appeal



that are not frivolous. Accordingly, the motion of the public defender for leave to withdraw as counsel is granted, and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.  
Judgment affirmed.

ADESKO and BURMAN, JJ., concur.

Abstract only.





3D  
30 I.A. 695



No. 60682

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT COURT
Plaintiff-Appellant,	)	
	)	OF COOK COUNTY.
v.	)	
	)	HONORABLE
MILAN YUROSOVICH, and Matter of	)	THOMAS WALSH,
Search Warrant,	)	PRESIDING.
	)	
Defendant-Appellee.	)	

Before MCGLOON, P.J., McNAMARA and MEJDA, JJ.

PER CURIAM:

Defendant, Milan Yurosovich, was charged by complaint with theft in that he knowingly obtained control over a Marantz stereo receiver, a Harmon Kardon stereo system, two Panasonic portable cassette recorders and one Sony eight track stereo deck, of a value of more than \$150, the property of Wholesale Electronics, Chillicothe, Ohio, knowing them to have been stolen by another with the intent to deprive the owner permanently of the use and benefit of the property in violation of Ill.Rev.Stat. 1973, ch. 38, par. 16-1(d)(1). The charge grew out of the execution of a search warrant for Milan Yurosovich, his person and a house and storage shed at 17224 Country Lane, East Hazelcrest, Illinois, issued at 3:00 p.m., February 21, 1974, by Judge Nathan J. Kaplan. Following a hearing on April 23, 1974, the court granted the defendant's motion to quash the warrant and suppress the evidence obtained as a result of the execution of the search warrant. The State has appealed pursuant to the provisions of Supreme Court Rule 604(a) (Ill.Rev.Stat. 1973, ch. 110A, par. 604(a)), contending (1) the complaint for search warrant established the reliability of the persons who provided the information and established probable cause and (2) an associate judge does not have authority to hear a motion to quash a search warrant and suppress evidence under Supreme Court Rule 295 when read in connection with Section 114-12(d) of the Criminal Code. Ill.Rev.Stat. 1973, ch. 110A, par. 295 and ch. 38, par. 114-12(d).

The complaint for search warrant requested the issuance of a warrant for the person of Milan Yurosovich and a house and storage shed at 17224 Country Lane, East Hazelcrest, Illinois,



to seize "one Marantz Receiver Model 4300, 1 Sansui Receiver Model 7055, 1 Dual Turntable Model #701, 1 Sony 5" colored T.V. Set Model KV 5000, Serial #019739" which, it was alleged, had been used in the commission of a burglary and constituted evidence of burglary. The complaint further alleged the complainant had probable cause to believe that the listed "things to be seized" were then located upon the premises set forth in the complaint for search warrant, "based upon the following facts":

On February 21, 1974, I, Edward Cisowski, special agent, Illinois Bureau of Investigation, had a conversation with a citizen of this State who advised me that on February 19, 1974, he saw Emory Cantrell in possession of the above listed stereo equipment in Homewood, Illinois. Cantrell told this citizen that the merchandise had been stolen by him (Cantrell) in Ohio and that he was going to store some at the residence of Milan Yurasovich at 17224 Country Lane, East Hazel Crest, Illinois. The citizen informed me that he later visited Yurasovich and personally observed the above same merchandise in a bedroom at 17224 Country Lane, East Hazel Crest, Illinois. The citizen gave a statement to I.B.I. agents on February 21, 1974.

I also spoke to another citizen on February 21, 1974, who told me that Emory Cantrell told the informant that he burglarized an electronics company in Portsmouth, Ohio, and showed the citizen the above listed stereo merchandise. He also told the citizen that he had stolen \$1500.00 U.S. currency in the same burglary and he showed the citizen the cash proceeds, some of which was still rolled. The citizen observed Cantrell load the same merchandise into a Black Thunderbird with a California license plate to transport it to Yurasovich's house. Said citizen directed me to a receipt and told me the receipt was Cantrell's.

I have spoken to both citizens for several hours and, after examining them, find both to be prudent and truthful individuals.

I telephoned the Portsmouth (Ohio) Police Dept. and determined that the Wholesale Electronic Company, 825 Gallia St., Portsmouth, Ohio, was burglarized on February 3, 1974; said company and said address matched the receipt mentioned above. Agent O'Sullivan requested the serial numbers of the merchandise taken in this burglary from the Portsmouth Police Department and received a list on this date, February 21, 1974, by LEADS teletype. (Copy attached to this complaint as Appendix 1)

On Same date, February 21, 1974, I received information that a felony warrant had been obtained by the Homewood Police Dept. for the arrest of Emory Cantrell. Having the above stated information as to

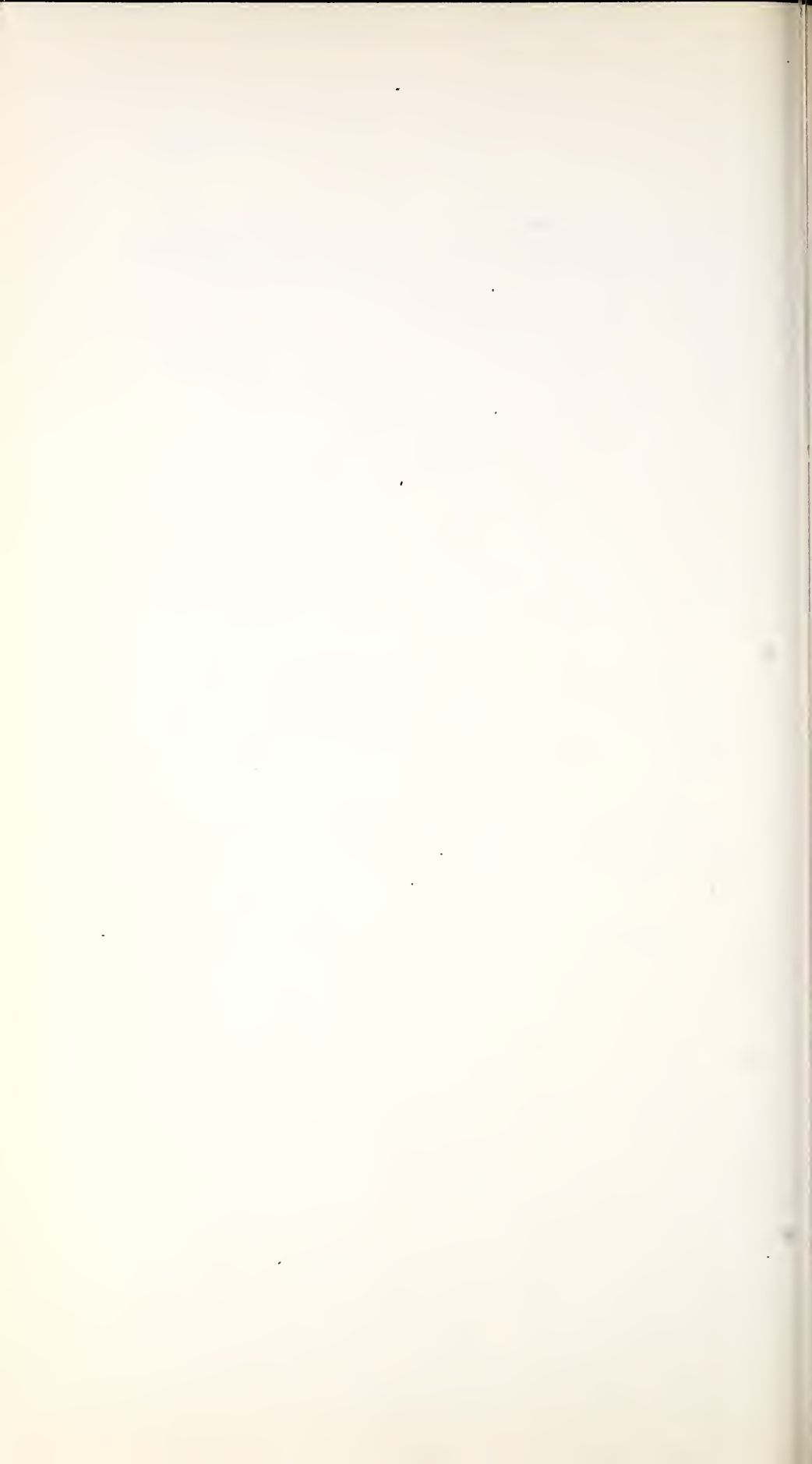


Cantrell's whereabouts, agents of the Illinois Bureau of Investigation staked out the home of Milan Yurasovich. At approximately 1230 hours, Yurasovich approached Special Agent O'Sullivan outside his home and asked if he was looking for Cantrell. After answering in the affirmative, Yurasovich told S/A O'Sullivan that Cantrell had been there but had left and they were free to enter his home and look for him. S/A William Biros entered with Yurasovich and looked in the rooms, under beds, and behind couch. While doing so he (Biros) observed a Sony colored television set on the couch and noted the serial number to be 019739. He also observed an unopened box bearing the name Wholesale Electronic, Chillicothe, Ohio. The agents, not finding the wanted individual, withdrew to their official cars. Having been so informed, I noted that the Sony television was one of those stolen and listed on the LEADS teletype message. S/A Shields telephoned one William Christman at Wholesale Electronics, Chillicothe, Ohio, 614-774-4740. Christman informed S/A Shields that a box similar to the one observed by S/A Biros had in fact been taken from their Portsmouth facility on February 3, 1974.

I have personal knowledge that Milan Yurasovich has been arrested 6 times for burglary, that he has convictions for attempt murder and burglary and has served time in the Illinois State Penitentiary. He also has various other convictions, including one for larceny. Yurasovich has an FBI arrest number of 395982C.

Based upon the above facts and knowledge that stolen goods are presently in the Yurasovich home, I hereby request a search warrant to issue for the above house and storage shed wherein I believe the above stolen items are stored.

At a hearing on April 23, 1974, the State argued that the court, an associate judge, did not have authority to hear the motion to suppress under Section 114-12(d) of the Criminal Code, which provides that a motion to suppress evidence illegally seized "shall be made only before a court with jurisdiction to try the offense." (Ill.Rev.Stat. 1973, ch.38, par.114-12(d).) After the motion was denied, the defendant called as his witness William Biros, a special agent for the Illinois Bureau of Investigation, who testified he did not have occasion to talk to the persons designated as citizens in the complaint for search warrant, but on the morning of February 21, 1974, he did have occasion to enter the premises at 17224 Country Lane with another I.B.I. agent. He testified the defendant invited "us" in and no objection was made by anybody to his entering the premises. Delores Starr was among the persons present at



the time. He searched for Mr. Cantrell, and did not find him and then left. But while at the premises he observed several boxes of goods marked from "a place in Portsmouth, Ohio," a 25-inch color television set with a little tag marked "Wholesale Electronics," the name of the store burglarized in Ohio, two boxes marked Chillicothe, Ohio, and cassette boxes stacked on top of that box. The serial number of the television set matched the one from Ohio.

Defendant then called another I.B.I. agent, Wayne Filroh, who testified he did talk to one of the persons named as a citizen in the complaint. Objection was sustained to the name of the citizen with whom he talked. The citizen he talked to was not under arrest at the time or under investigation and freely related to him the conversation, the contents of which were set forth in the complaint for search warrant.

Defendant also called Delores Starr, who testified she owns the premises in question and the defendant does not reside there. When the officer told her they got permission to search from "Milan," she told them it was not his house and told them she did not want them in her house. One officer told her he could get a search warrant and come back and really tear the place up and she said, "Go ahead." On cross-examination, she testified she has known the defendant twenty years, that he comes over to her house very often and stayed overnight frequently because he had been working on her home. He has a key to the house and is free to come and go when he wants.

At the conclusion of the hearing, the judge quashed the warrant on the basis that the complaint for search warrant did not establish the reliability of the persons who provided the information contained in the complaint.

The State first contends that the reliability of the information contained in the complaint is established because it was provided by ordinary citizens who are "presumed" to be reliable. However, in the case at bar, the persons providing

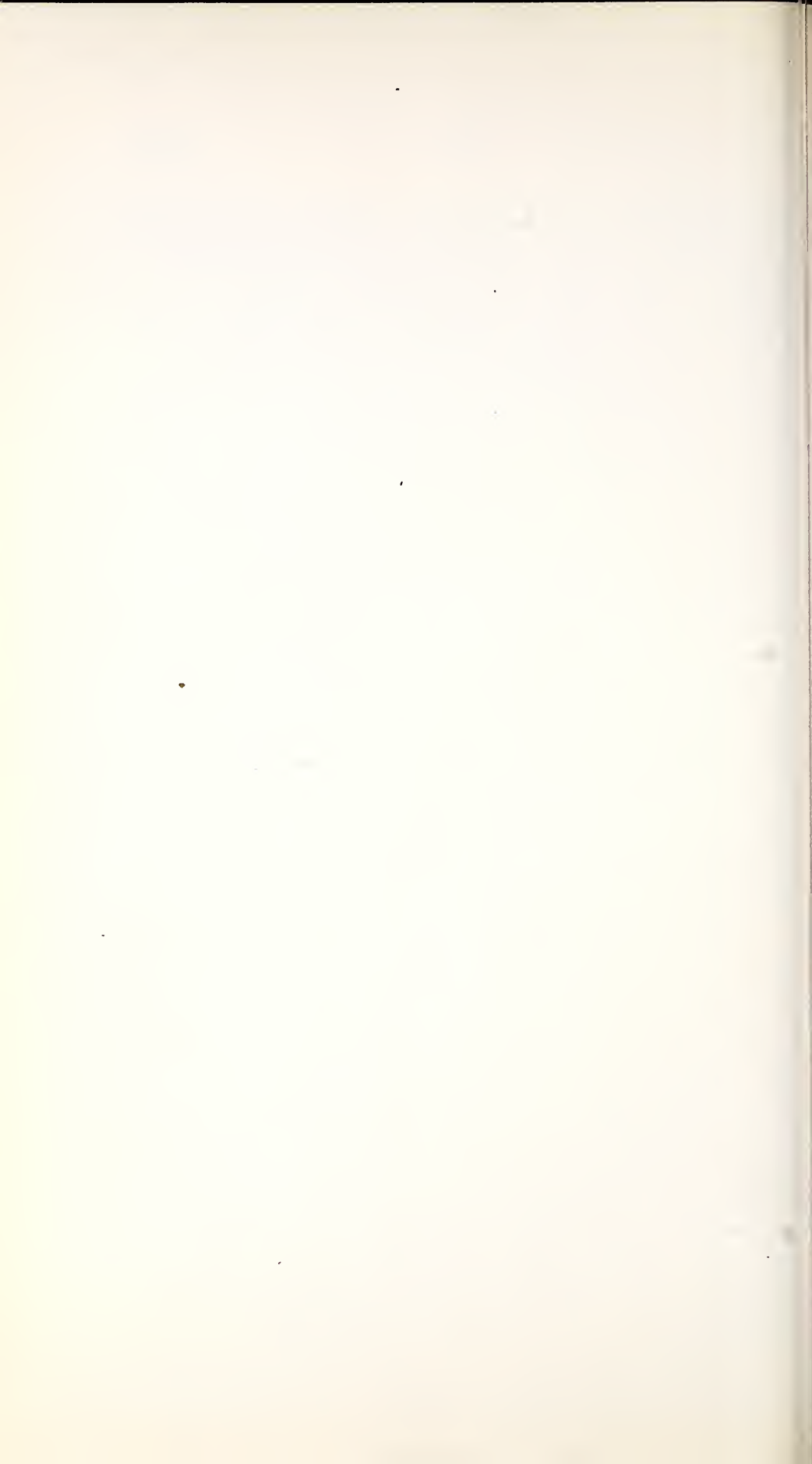




the information are not identified. Although a search warrant may be based on hearsay, the United States Supreme Court in Aguilar v. Texas (1964), 378 U.S. 108, 114, held that the judicial officer issuing the warrant must be informed of some of the underlying circumstances from which the informant concluded that the matters to be seized were where he claimed they were and of some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. Among the circumstances from which it might be concluded that a person supplying information is credible and the information reliable must be numbered the circumstance that the person states his identity or, as in the case at bar, that that person does not state his identity. Knowledge of a person's identity provides the judicial officer who is asked to issue the warrant with certain information, such as whether the person providing the information is a victim, a disinterested third party, a co-defendant, a possible suspect, or a law enforcement officer, and reveals other significant characteristics of the person who is the source of the information. Anonymity is not an indicia of reliability.

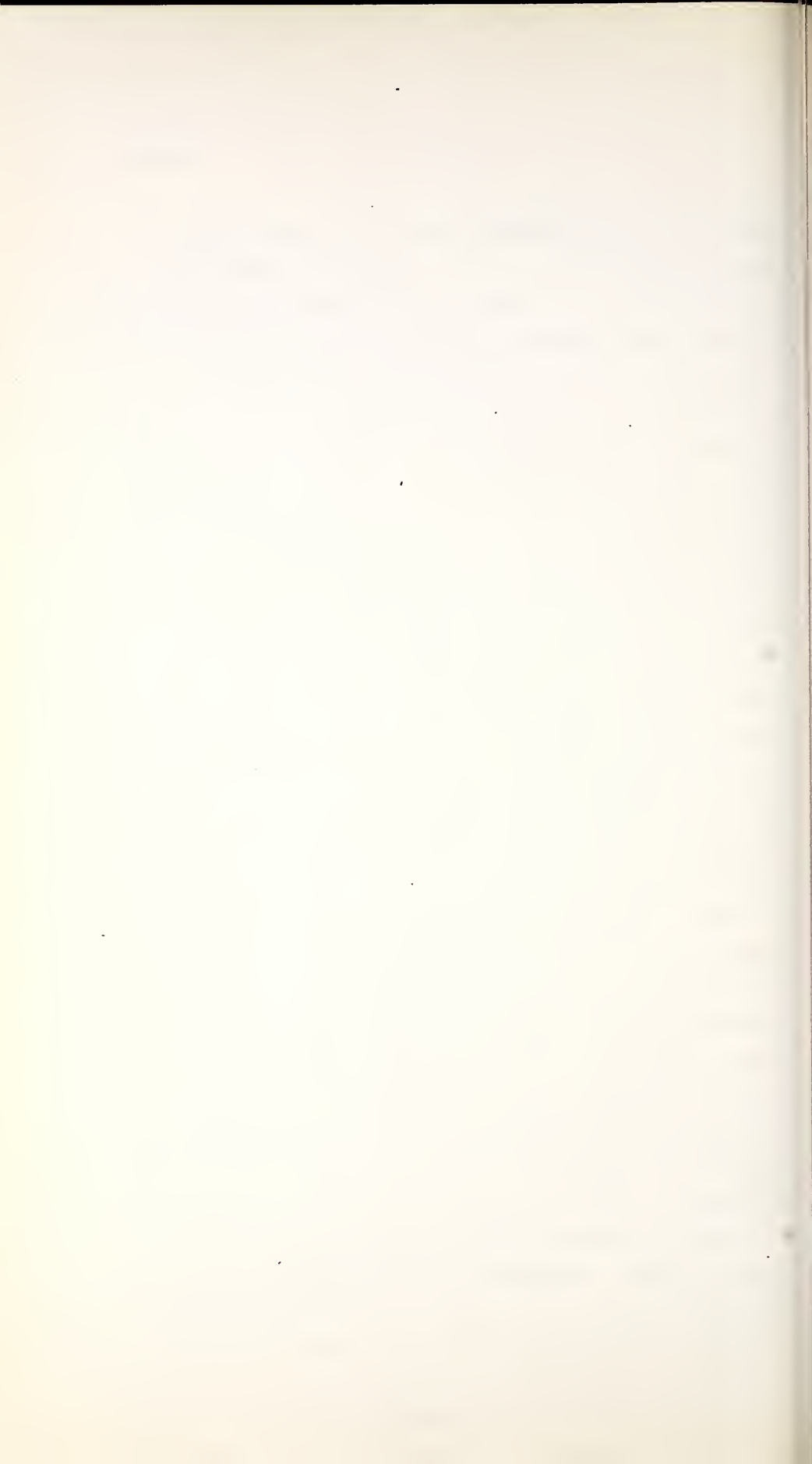
The complaint in question here does not state the identity of the persons providing the information. Indeed, the only information contained in the first three paragraphs of the complaint for warrant tending to establish the reliability of the unnamed "citizens" providing the information is the statement of the affiant that he had spoken "to both citizens for several hours and, after examining them," found both of them to be "prudent and truthful individuals." This allegation is but the statement of a conclusion, which Aguilar holds is insufficient. See, also, People v. Pelton (1975, 3rd Dist., No. 74-354), --111. App.3d--, where a search warrant was found wanting because reliability of the informant was not demonstrated.

However, this complaint does provide additional information from which the issuing judicial officer could properly have



concluded that the information supplied was accurate and reliable. One of the "citizens" provided the information that the proceeds of a robbery of a Portsmouth, Ohio, electronics firm were on the premises in question. The affiant, a police officer, contacted the Portsmouth, Ohio, Police Department and determined that a burglary of the Wholesale Electronics Company had occurred some two weeks earlier on February 3, 1974, and another agent (Officer O'Sullivan) arranged for the Portsmouth Police Department to forward by teletype a list of the serial numbers of the merchandise taken in the February 3, 1974, burglary. Officer Cisowski later learned that a felony warrant had been obtained by the Homewood Police Department for Cantrell and agents of the Illinois Bureau of Investigation "staked out" defendant's home. There, defendant approached Agent O'Sullivan asking if he was looking for Cantrell, stating Cantrell had left and that the officers were free to enter his home and look for Cantrell. Defendant then accompanied Special Agent Biros in a search of the home, during which Biros observed the Sony color television set on the couch and the serial number, which subsequent investigation indicated matched that of a Sony television set listed on the LEADS teletype message as taken in the Portsmouth, Ohio, burglary. Biros also observed an unopened box bearing the name "Wholesale Electronics, Chillicothe, Ohio." The subsequent telephone call by Special Agent Shields to William Christman at Wholesale Electronics, Chillicothe, Ohio, revealed that, according to Christman, a box similar to that observed by Biros was taken from the Portsmouth facility on February 3, 1974.

The investigative efforts of the affiant and the other agents, therefore, established the reliability of the hearsay information provided by the unnamed citizens. The additional information obtained when Officer Biros entered the premises in question and observed what he later discovered to be a stolen television set was not only a reason for crediting the hearsay



information provided by the two "citizens" to the effect that Cantrell was storing stolen property on those premises, but was sufficient in and of itself to establish probable cause, since the officers then knew themselves, apart from any information initially provided by informers, that stolen property was in fact on the premises. Information provided by a fellow law enforcement officer based on that officer's personal observations, was information upon which Officer Cisowski could properly rely. The requirements of Aguilar v. Texas, therefore, were met in this case since further investigation by the officer who executed the complaint for search warrant revealed a substantial independent basis for crediting the hearsay information provided by the unidentified, anonymous "citizens."

Defendant also contends the testimony shows clearly that the owner of the premises, Delores Starr, did not consent to the search. However, the rule is well established in Illinois that there is no right to controvert the facts related in the affidavits supporting the search warrant. (People v. Bak (1970), 45 Ill.2d 140, 258 N.E.2d 341; People v. Mitchell (1970), 45 Ill.2d 148, 258 N.E.2d 345, cert. den. in both cases, 400 U.S. 882.) The trial court erred in quashing the warrant.

In view of our holding on the above issue, it is unnecessary to consider the State's additional contention.

The judgment of the circuit court of Cook County is therefore reversed and the cause remanded for further proceedings.

Reversed and remanded.



3D  
30 I.A. 706



60871

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Respondent-Appellee,	)	OF COOK COUNTY.
	)	
v.	)	
	)	
CELESTER JONES,	)	HONORABLE
	)	JOSEPH A. POWER,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM (FIRST DISTRICT, FIRST DIVISION)

Before Burke, P.J., Goldberg and Simon, J.J.

Celester Jones, petitioner, appeals the dismissal of his post-conviction petition filed pursuant to the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1, et seq.) without an evidentiary hearing.

Petitioner was originally charged by indictment with the crimes of murder and armed robbery. After a jury trial, petitioner was found guilty and sentenced to a term of 40 to 80 years on the charge of murder and 10 to 30 years on the charge of armed robbery, both sentences to run concurrently. Petitioner appealed and on March 30, 1972, the Illinois Supreme Court affirmed his conviction. People v. Brooks (1972), 51 Ill.2d 156, 281 N.E.2d 326.

Subsequently, petitioner filed a pro se post-conviction petition. Counsel was appointed to represent petitioner and on August 8, 1974, a supplemental post-conviction petition was filed. Upon motion of the State, petitioner's post-conviction petitions were dismissed without an evidentiary hearing.

Petitioner wished to appeal and the public defender of Cook County was appointed to represent him. After examining the record, the public defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California (1967), 386 U. S. 738, a brief in support of the motion was also filed. The brief states that an appeal in this case would raise no meritorious issues. Petitioner was mailed copies of the motion and brief on January 21, 1975. He was informed that he had until March 28, 1975, to file any additional points he might choose in support





of his appeal. He has not responded.

The motion and brief of the public defender allege that the only possible argument which could be raised on appeal is whether petitioner's post-conviction petition was properly dismissed without an evidentiary hearing.

Petitioner alleged in his pro se petition:

(1) that his request to make a telephone call was denied which resulted "in admitting certain evidence against [him] at trial";

(2) that the State knowingly used the perjured testimony of two witnesses at his trial;

(3) that he was prejudiced by remarks of counsel for a co-defendant who stated at trial, "We expect the evidence to show, there wouldn't be anybody sitting on trial here before you ladies and gentlemen today without his cooperation," and stated that his client said, "I'll show you. Let's go to where the triggerman is.";

(4) that he was prejudiced when the trial judge said during a hearing on a motion for severance, "This cause has been on for almost two weeks and I wouldn't endeavor to remember all the testimony.";

(5) that he was prejudiced by the testimony of two police officers who stated they advised petitioner of his constitutional rights;

(6) that he was prejudiced when a co-defendant was granted a mistrial, and he was not;

(7) that he was improperly denied a bill of particulars.

In the supplemental petition prepared by the public defender, petitioner alleged:

(8) that he was improperly denied a severance from two co-defendants;

(9) that he was prejudiced by the admission into evidence of statements made by his co-defendants implicating petitioner;

(10) that he was prejudiced by the opening statement and questions asked by counsel for a co-defendant which referred to petitioner as committing the crime;



(11) that the court improperly denied his request for a mistrial.

A proceeding under the Post-Conviction Hearing Act is a new proceeding for the purpose of inquiring into the constitutional phases of the original conviction which have not already been adjudicated. (People v. Beckham (1970), 46 Ill. 2d 569, 264 N.E. 2d 149; People v. Derengowski (1970), 44 Ill. 2d 476, 256 N.E. 2d 455.) Where an allegation has previously been considered and rejected by this court, any reconsideration of the same allegation in post-conviction proceedings is barred by the doctrine of res judicata. (People v. Walker (1972), 6 Ill. App. 3d 909, 286 N.E. 2d 812; People v. Westbrook (1972), 5 Ill. App. 3d 970, 284 N.E. 2d 695.) The concept of res judicata includes not only all the issues raised, but any claim which could have been raised but was not, those being considered waived. (People v. Adams (1972), 52 Ill. 2d 224, 287 N.E. 2d 695; People v. Jones (1972), 5 Ill. App. 3d 951, 284 N.E. 2d 418.) The rule will be relaxed only where fundamental fairness requires it. People v. Mamolcila (1969), 42 Ill. 2d 69, 245 N.E. 2d 485.

In the case at bar, the allegations petitioner now makes in his pro se and supplemental post-conviction petitions numbered 3, 6, 8, 9, 10 and 11 above were raised in his direct appeal, decided adversely to defendant and reconsideration of them is, therefore, barred by the doctrine of res judicata. The remaining issues were all known from the trial record and could have been raised in petitioner's direct appeal. Having once had an opportunity to have these issues considered in his direct appeal, petitioner is now barred from any further consideration of the post-conviction proceedings under the principle of waiver. The record is devoid of any circumstances which would lead us to relax the doctrine of res judicata. The trial court properly granted the State's motion to dismiss petitioner's post-conviction petition.

After a full examination of all of the proceedings in accordance with the dictates of Anders, we concur in the opinion of the public defender that none of the arguments thus raised has substantial merit and that an appeal is



wholly frivolous. Our independent examination of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;  
JUDGMENT AFFIRMED.

(Abstract only.)



3D  
30 I.A. 707



61054

PEOPLE OF THE STATE OF ILLINOIS,  
Plaintiff-Appellee,

v.

WILLIAM L. BARBEE,  
Defendant-Appellant.

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

HONORABLE  
BENJAMIN S. MACKOFF,  
Presiding.

PER CURIAM:

Before McGLOON, PJ., McNAMARA and MEJDA, JJ.

Defendant, William L. Barbee, after a bench trial, was found guilty of the crime of armed robbery (Ill. Rev. Stat. 1973, ch. 38, par. 18-2), and was sentenced to a term of 5 to 15 years. He appeals, arguing that at the time of sentencing the trial judge was under the mistaken belief that under the Unified Code of Corrections he would have to impose a maximum sentence three times the minimum.

Since defendant does not challenge the sufficiency of the evidence against him the facts adduced at trial may be summarized. On April 23, 1973, at approximately 1:00 A.M., Theresa Timlin was in her car at 948 East 75th Street, waiting for a friend who was in a nearby lounge, when the defendant, accompanied by another man and a woman, forcibly entered her car. While one of the men held a knife to her neck, the defendant demanded her purse and threatened to rape her. He took \$17 from her purse. Her friend then came out of the lounge and the offenders drove off in Theresa Timlin's car, taking her with them. She was released about five blocks away.

Later that morning, after a high speed chase, the police recovered the car. The defendant was arrested as he was attempting to get away after the police had stopped the automobile.

Defendant's only argument on appeal is that at the time of sentencing, the trial judge was under the mistaken belief that to sentence defendant





for the crime of armed robbery—a Class 1 felony—under the Unified Code of Corrections he would have to impose a maximum sentence that was three times the minimum sentence, when in fact the one-third principle applies only to Class 2 and Class 3 felonies. The record reflects that in sentencing the defendant the trial judge said:

"The minimum term in armed robbery is four years. State has recommended that the term imposed be five years. And based upon a recommended spread of three times on top which was recommended by the Committee on Uniform Code of Corrections, that would be five to fifteen years."

Defendant argues that this statement by the trial judge demonstrates that he was under the belief that the one-third principle was mandatory for Class 1 felonies. We cannot accept that argument. The trial judge's statement did not indicate that he believed the one-third principle was mandatory. He stated that a spread whereby the maximum would be three times the minimum was recommended by the committee on the Unified Code of Corrections. The Committee Comments to section 1005-8-1 of the Criminal Code make it clear that the one-third principle was adopted and made mandatory in Class 2 and 3 felonies, based upon several recent appellate court cases and the American Bar Association sentencing standards. The Comments state that "Such a spread allows the Pardon and Parole Board to release the defendant at the best time for all concerned." (Committee Comments, Smith-Hurd Annot., 1973, ch. 38, par. 1005-8-1.)

Here, the trial judge's statement indicated only that he was using the one-third rule as a guideline. Such a spread—while not mandatory for a Class 1 felony—has been recommended by the American Bar Association in its standards on sentencing as well as several recent cases. (See People v. Johnson (1973), 11 Ill.App. 3d 745, 297 N.E. 2d 683.) The trial judge, who heard all the testimony adduced at trial and conducted the hearing in aggravation and mitigation, imposed a sentence of



5 to 15 years. After a complete review of the entire record, we cannot say that the sentence was improper in any way.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.



Bar Assoc.

3D

30 I.A. 722



61268

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appeal from the Circuit
	)	
v.	)	Court of Cook County.
	)	
	)	
GREGORY GATES, otherwise called	)	Honorable
WESLEY JACKSON,	)	Louis J. Gilberto,
	)	Judge Presiding.
Defendant-Appellant.	)	

Before McGloon, P.J., and McNamara and Dempsey, JJ.

PER CURIAM:

Gregory Gates was found guilty after a bench trial of the crime of armed robbery (Ill.Rev.Stat., 1973, ch. 38, par. 18-2). He was sentenced to a term of four to six years.

The Public Defender of Cook County was appointed to represent him on appeal. After examining the record, the public defender has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California (1967), 386 U.S. 738, a brief in support of the motion has also been filed. The brief states that the only possible argument which could be raised on appeal is that the evidence did not establish the defendant's guilt beyond a reasonable doubt because the identification testimony was insufficient. The brief concludes that an appeal on this issue would be wholly frivolous and without merit. Copies of the motion and brief were mailed to the defendant on April 11, 1975. He was informed that he had until June 16, 1975, to file any additional points he might choose in support of his appeal. He has responded and has requested that the public defender be allowed to withdraw and that new counsel be appointed.



At trial, Robert Murray, age 69, testified that he was the owner of a bicycle repair shop located at 4212 West Cermak Road, Chicago, Illinois. He also sold candy, gum and potato chips in his store. On March 3, 1973, shortly after noon, the defendant entered his store and asked for some gum, and engaged Murray in a conversation about doing television repairs. Murray informed him that after having a heart attack he discontinued that type of work. After approximately 15 minutes the defendant left the store. Thirty minutes later he re-entered the store. At that time the defendant pulled a gun and announced a robbery; he reached over the counter and took eight dollars from Murray's pocket. He then ordered Murray to lie down on the floor and threatened to kill him if he did not comply. The defendant took a 14-inch portable television set from the store and fled in a car parked a short distance down the street. Murray then called the police. The entire robbery took between five and ten minutes.

On March 7, 1973, Murray went to the police station where he viewed several books of photographs. He identified a photograph of the defendant as the man who had robbed him. Several days later Murray was again called to the police station by a different detective. He viewed several books of photographs and again identified a photograph of the defendant as the man who had robbed him. The detective then drove Murray to the Chicago police headquarters to swear out a warrant against the defendant. While in chambers the detective informed the judge that the defendant had been in trouble since 1967. The trial judge issued the warrant and set a bond of \$10,000.





Chicago police investigator Joseph Kirchen testified that he was one of the officers assigned to the investigation of the armed robbery of Robert Murray occurring on March 3, 1973. On March 15, 1973, he contacted Murray and asked him to come down to the station for the purpose of obtaining a warrant against the defendant. After Murray arrived at the police station, Kirchen showed him six photographs. Murray identified the photograph of the defendant as the man who had robbed him. Thereafter, Kirchen accompanied Murray to the police headquarters where a warrant was obtained for the defendant's arrest.

Regina Walker, the defendant's girlfriend, testified that on March 3, 1973, the defendant was ill and stayed in bed in her home.

The brief of the public defender states that the only possible argument which could be raised on appeal is that the evidence did not establish the defendant's guilt beyond a reasonable doubt because the identification testimony was insufficient. The defendant in his response makes a similar argument. In a bench trial the credibility of witnesses and the weight to be given to their testimony are matters for the trial court to determine. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to the defendant's guilt will the findings of the trial court be disturbed. People v. Clark (1972), 52 Ill.2d 374, 288 N.E.2d 363; People v. Holmes (1972), 6 Ill.App.3d 254, 285 N.E.2d 561. The testimony of a single witness if positive and credible is sufficient to sustain a conviction. People v. Griffin (1973), 12 Ill.App.3d 193, 297 N.E.2d 770.



In the case at bar, the defendant's photograph was identified by Murray several days after the incident when Murray viewed several books of photographs. The practice of showing photographs of suspects to witnesses has been approved and is essential to effective law enforcement. People v. Brown (1972), 52 Ill.2d 94, 285 N.E.2d 1; People v. Moore (1974), 17 Ill.App.3d 507, 308 N.E.2d 210. There is no evidence that the police, in showing Murray the books of photographs, used any impermissible suggestions to draw his attention to the photograph of the defendant. In its response to this court, the defendant argues that if Murray's photographic identification was positive, the police officers would have immediately secured a warrant for his arrest and would not have asked Murray to make a second photographic identification. This argument does not find support in the record. The evidence shows that a different detective was assigned to the case and that he called Murray to the station for the purpose of securing an arrest warrant. At that time Murray again identified a photograph of the defendant. While there is a discrepancy in the testimony as to whether Murray's second photographic identification of the defendant was made from a book of photographs or from six photographs, this at best presents a matter of credibility which is for the trier of fact to determine.

At trial, Murray testified that when the defendant first entered his store, he was able to get a clear look at the defendant's face for approximately 15 minutes. A short time later the defendant returned to the store and announced a robbery. At that time the defendant was in Murray's presence for five to ten minutes. At



trial Murray stated that he "would never forget that [defendant's] face." Murray's testimony established that he had a sufficient opportunity to observe the defendant under adequate lighting so as to properly fix his identity. People v. Wright (1973), 10 Ill. App.3d 1035, 295 N.E.2d 510.

While the defendant at trial presented evidence of an alibi, this was insufficient to raise a reasonable doubt as to his guilt since a trial judge is not obliged to believe the defendant's alibi testimony. People v. Jones (1974), 18 Ill.App.3d 198, 309 N.E.2d 776. After hearing all the testimony adduced at trial, the trial judge found the evidence sufficient to establish defendant's guilt beyond a reasonable doubt. After a complete review of the entire record, we cannot say that his determination was erroneous.

The defendant also argues that Murray's in-court identification was tainted by the police officer's statement at the time the warrant was issued that the defendant had been in trouble since 1967. This statement by the police officer was made to the trial judge at the time the warrant was issued for defendant's arrest to adequately apprise the trial judge of the defendant's background so that he could set a proper bond in the case. Prior to this statement being made, the complainant had already identified the defendant by photograph on two separate occasions. There is no evidence that Murray's in-court identification of the defendant was in any way influenced by the officer's remark.

We have examined the record and concur in the opinion of the public defender that the argument thus raised does not have



substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which would not be frivolous. The defendant has asked for the appointment of different counsel to pursue his appeal. In light of our conclusion that there are no meritorious issues which could be raised, defendant's request is denied. The public defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the Circuit Court of Cook County is affirmed.

Motion allowed;  
judgment affirmed.





Bar Assoc.

3D  
30 I.A. 728



Nos. 60943, 60944,  
60945 and 60946

PEOPLE OF THE STATE OF ILLINOIS	)	
and THE CITY OF CHICAGO, a	)	APPEAL FROM THE CIRCUIT
Municipal Corporation,	)	
	)	COURT OF COOK COUNTY.
Plaintiffs-Appellants,	)	
	)	HONORABLE
v.	)	WAYNE W. OLSON,
	)	PRESIDING.
JOHN L. ROGERS,	)	
	)	
Defendant-Appellee.	)	

Before DEMPSEY, McNAMARA and MEJDA, JJ.

PER CURIAM:

As a result of a warrantless search of the trunk of the defendant's automobile on June 9, 1974, he was charged by information with the following four weapons offenses based on his possession of certain firearms described in detail in the complaint and discovered in the trunk: unlawful use of weapons in violation of Ill.Rev.Stat. 1973, ch.38,par.24-1(a)(10); failure to register as a gun owner while possessing firearms and ammunition without possessing a firearmsowner's identification card in violation of Ill.Rev.Stat. 1973, ch.38,par.83-2; unlawful use of weapons in that he carried concealed in his vehicle certain described firearms having been convicted of a felony (burglary, on July 7, 1969) in violation of Ill.Rev.Stat. 1973, ch.38,par.24-1(a)(4); and with the failure to register these firearms in violation of ch.11.1, §1.7 of the Municipal Code of the City of Chicago. Pursuant to the provisions of Supreme Court Rule 604 (a)(1), the State appeals from an order of the circuit court of Cook County entered July 31, 1974, sustaining the defendant's motion to suppress the evidence on the ground it was illegally seized. (Ill.Rev.Stat. 1973, ch.110A,par.604(a)(1).) The State contends that the police officer had probable cause to search the defendant's vehicle and that the defendant consented to the search.

The only witness called on the motion to suppress was Chicago Police Officer Alex Muscolino who testified he had no warrant for the defendant's arrest and did not observe him committing any unlawful act. He was on foot patrol in an open air market with two other officers when he was approached by a citizen whom he



described as a male Mexican, but whom he had not known previously and whose name he did not record. This man told the officer that another man, whom he described as a male Negro, was selling guns out of his gold Cadillac and had tried to sell him a gun and that the Cadillac was in a parking lot, alongside of a church, a block and a half away. The police officer immediately investigated and arrived at the parking lot a couple of minutes later. He observed the defendant, who apparently fit the description given, and a male Mexican both of whom were in back of a Cadillac looking into the open trunk. The men looked in the direction of the policemen and the male Mexican ran from the parking lot and down the alley. The defendant closed the trunk. Officer Muscolino then proceeded to that location, and had a conversation with the defendant. He related the conversation as follows: "Yes, we asked him, immediately, if he would open the trunk and that he did." The defendant said he would open the trunk and upon opening the trunk, Officer Muscolino observed a number of guns and arrested the defendant.

The State first contends that the defendant voluntarily consented to the search. As we read the record, the trial judge made a finding that under the circumstances the defendant did not voluntarily consent to the search. The rule is that consent to a search must be proved by clear and positive testimony. The Illinois Supreme Court has stated that although it will not invalidate a search simply because of the failure to advise a suspect of rights secured by the Fourth Amendment, such a failure is a fact bearing on whether the "consent" was truly voluntary. Officer Muscolino's conclusionary testimony that he "asked" the defendant if he would immediately open the trunk and that the defendant complied falls short of the clear and convincing evidence that is required to show a voluntary waiver of this Fourth Amendment right. The trial court, therefore, did not err in holding that the defendant did not waive his Fourth Amendment rights by voluntarily opening the trunk of his car when Officer Muscolino asked him to do so. See Schneckloth v. Bustamonte (1973), 412 U.S. 218; People v. Naskeel (1968), 41 Ill.2d 25, 241 N.E.2d 430.



However, considering all the circumstances, we disagree with the trial judge's conclusion that the officer did not have probable cause to search the trunk. Recently, in People v. Watkins (1974), 23 Ill.App.3d 1054, 1064-1066, 320 N.E.2d 59, we restated the principle that where a police officer possesses probable cause at the scene of an arrest that the contents of an auto offend against the law and where there exist exigent circumstances, a warrantless search of the auto is constitutionally permissible. (See, also, Chambers v. Maroney (1970), 399 U.S. 42; Carroll v. United States (1925), 267 U.S. 132; Cady v. Dombrowski (1973), 413 U.S. 433.) The fact that this was a search of an automobile rather than a home or office or the search of an individual's person is important since it "tends to reduce somewhat the quantity of information which the officer needs to justify his actions." (People v. Johnson (1973), 13 Ill.App.3d 204, 209, 300 N.E.2d 535.) Relevant, also, is the rule that police officers are justified in relying upon information provided to them by ordinary citizens since the requirement of prior reliability applicable to "tips" from informers does not apply when ordinary citizens supply information without seeking the protective cloak of anonymity. (People v. Hester (1968), 39 Ill.2d 489, 514, 237 N.E.2d 466.) While the police officers here made no record of the name of the citizen who provided the information, it is clear that the information was not coming from a professional informer but from an ordinary citizen to whom the defendant had tried to sell one of the weapons.

Bearing these principles in mind, we conclude that Officer Muscolino had probable cause to believe that there were weapons in the trunk of the Cadillac when he approached. The information provided by the ordinary citizen was not inherently improbable and the officers properly relied upon it and made an immediate investigation. A couple of minutes later when Officer Muscolino arrived at the parking lot, his observations corroborated the information supplied to him moments earlier, since he observed



the defendant and another man looking into the trunk. All that was lacking at this point was for the officer to actually see the contraband with his own eyes. The action of the defendant in closing the trunk and of the other man in fleeing, if not actually incriminating, was at least suspicious and warranted further investigation. Under these circumstances, Officer Muscolino was justified in believing that a crime was being committed and that illegal weapons, as stated by the citizen, were in the trunk and that the defendant was selling them.

Since the search of the trunk was proper, the judgment of the circuit court of Cook County in suppressing the evidence is reversed and the cause is remanded for further proceedings.

Reversed and remanded.





30 I.A. 724



60597

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY.
	)	
v.	)	
	)	
DARNELL JOHNSON,	)	HONORABLE
	)	LOUIS B. GARIPPO,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (FIRST DISTRICT, FIRST DIVISION).

Before Burke, P.J., Egan and Simon, J.J.

Darnell Johnson, defendant, was found guilty after a bench trial of the crime of aggravated battery (Ill. Rev. Stat. 1973, ch.38, par.12-4). He was sentenced to a term of 2 to 10 years. Defendant appeals arguing that his motion to dismiss the indictment was improperly denied when the only evidence before the grand jury was the prosecutor's reading of testimony given before an earlier grand jury.

Since defendant does not challenge the sufficiency of the evidence against him, a recitation of the facts adduced at trial is unnecessary. The record reflects that defendant was originally indicted in May 1973. Subsequently, defendant was reindicted for the same offense in October 1973. The sole witness before the grand jury that returned the second indictment was an assistant state's attorney who read the transcript of the previous grand jury proceedings. Prior to trial defendant moved to dismiss the indictment. The trial court denied defendant's motion.

The grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. Jurors may act upon tips, rumors, evidence offered by the prosecutor or on their own personal knowledge. (U. S. v. Dionisio (1973), 410 U. S. 1.) A motion to quash an indictment does not permit the trial court to inquire into proceedings before the grand jury for the purpose of determining whether the



evidence heard was sufficient to support the indictment unless all the witnesses who testified before the grand jury were incompetent or all of the testimony upon which the indictment was returned was incompetent. (People v. Hopkins (1973), 53 Ill.2d 452, 292 N.E. 2d 418; People v. Jones (1960), 19 Ill.2d 37, 166 N.E. 2d 1; People v. Wheeler (1949), 403 Ill. 78, 84 N.E. 2d 832; People v. Bladek (1913), 259 Ill. 69, 102 N.E. 243; People v. Bissonnette (1974), 20 Ill.App.3d 970, 313 N.E. 2d 646; People v. McCracken (1965), 61 Ill.App.2d 457, 209 N.E. 2d 673.) Incompetent testimony is that testimony given by a witness who is disqualified by law, such as a witness who is mentally deranged. People v. Hopkins (1973), 53 Ill.2d 452, 292 N.E. 2d 418; People v. Jones (1960), 19 Ill.2d 37, 166 N.E. 2d 1.

Defendant makes no claim that any witnesses before the first grand jury whose testimony was read to the second grand jury were mentally deranged. Nor does the defendant claim that the testimony upon which the second indictment was returned was incompetent. The fact that an assistant state's attorney read to the grand jury which returned the indictment the transcript of proceedings before another grand jury does not constitute an improper attempt to influence the grand jury. (People v. Strauch (1910), 247 Ill. 220, 93 N.E. 126; People v. Bissonnette (1974), 20 Ill.App.3d 970, 313 N.E. 2d 646.) The reading of prior testimony in this manner by the assistant state's attorney constituted hearsay, but an indictment may be returned solely upon hearsay evidence. (Costello v. United States (1956), 350 U. S. 359; People v. Hopkins (1973), 53 Ill.2d 452, 292 N.E. 2d 418; People v. Jones (1960), 19 Ill.2d 37, 166 N.E. 2d 1.) Accordingly, we conclude that the proceedings before the second grand jury were proper, and that the indictment returned against the defendant was valid. Defendant's motion to dismiss the indictment was properly denied by the trial court.

JUDGMENT AFFIRMED.



30 I.A. 725



61258

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.	)	
	)	HON. DANIEL J. WHITE,
ROBY GRANT,	)	Presiding
	)	
Defendant-Appellant.	)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before Burke, P.J., Goldberg and Egan, JJ.

Roby Grant was found guilty after a bench trial of the crime of theft in violation of Section 16-1(a-1) of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a-1).) He was placed on conditional discharge for a period of one year.

On March 15, 1974, he filed a notice of appeal and the Public Defender of Cook County was appointed to represent him. After examining the record, the Public Defender filed a motion in this court to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396, a brief in support of the motion was filed. Defendant was mailed copies of the motion and brief on April 10, 1975. He was informed he had until June 13, 1975, to file any additional points he might choose in support of his appeal. He has not responded.

Chicago police officer Arthur Novit testified that on September 12, 1972, at about 1:30 A.M., he was working as a decoy on a team of police officers assigned to reduce crime on the Chicago Transit Authority "L" stations. Novit said he was dressed in plain clothes and reclining against the wall on the ramp to the CTA platform at the Congress Street station, 532 South Pulaski Road, Chicago, feigning drunkenness. His fellow officers, Gerald Neuffer and Philip Hayman, were concealed in a broom closet about eight feet away. Novit testified that defendant, whom Novit



identified in court, and Autrie Pounds entered the station. Defendant told Pounds to go to the entrance and "look out" for other people entering the station. Defendant began frisking Novit, touching him, his jacket and trouser pockets and took Novit's wallet from his trouser pocket. Novit said defendant began to run down the ramp when the police officers, by a pre-arranged signal, came out of the closet and hollered "Stop, police officers." Defendant dropped the wallet on the floor and it was recovered by Novit. Defendant then stopped and was placed under arrest.

The testimony of police officers Gerald Neuffer and Philip Hayman substantiated the testimony of police officer Novit.

Defendant testified that on September 12, 1972, at about 1:30 A.M., he entered the Congress Street "L" station alone and another man by the name of Autrie Pounds came in the "L" station after him. Defendant said he saw Novit on the "L" platform. Novit was lying down near the center part of the ramp. Defendant looked at Novit, nudged him with his foot and when Novit moved defendant walked down the ramp. The police officers shouted "Halt" and defendant stopped and was arrested. Defendant further testified that he did not take Novit's wallet, did not search him or "pat" him down. Other than pushing Novit with his foot, defendant said he did not do anything to come in contact with Novit.

The Public Defender states that the only possible issue on appeal is whether defendant was proven guilty beyond a reasonable doubt. Examination of the record indicates that there is no merit to this issue.

Chicago police officer Novit testified that when he was acting as a decoy, feigning drunkenness, at the Congress Street "L" station, the defendant took Novit's wallet and started to leave the station. Novit shouted "Hit" which was a pre-arranged signal for police officers Gerald Neuffer and Philip Hayman to





emerge from their hiding place in the broom closet; and that defendant was arrested as he attempted to flee down the ramp of the "L" station. Novit's testimony was substantially corroborated by the other police officers.

Defendant was the only witness for the defense. He admitted the fact that he entered the "L" station on the date and at the time that the police officers observed him. He admitted that he saw another man, Autrie Pounds, at the station but denied knowing him. Defendant stated he saw Novit lying on the ramp against the wall but denied talking to Novit or to Pounds. Defendant said he nudged Novit with his foot, but did not frisk Novit or take his wallet.

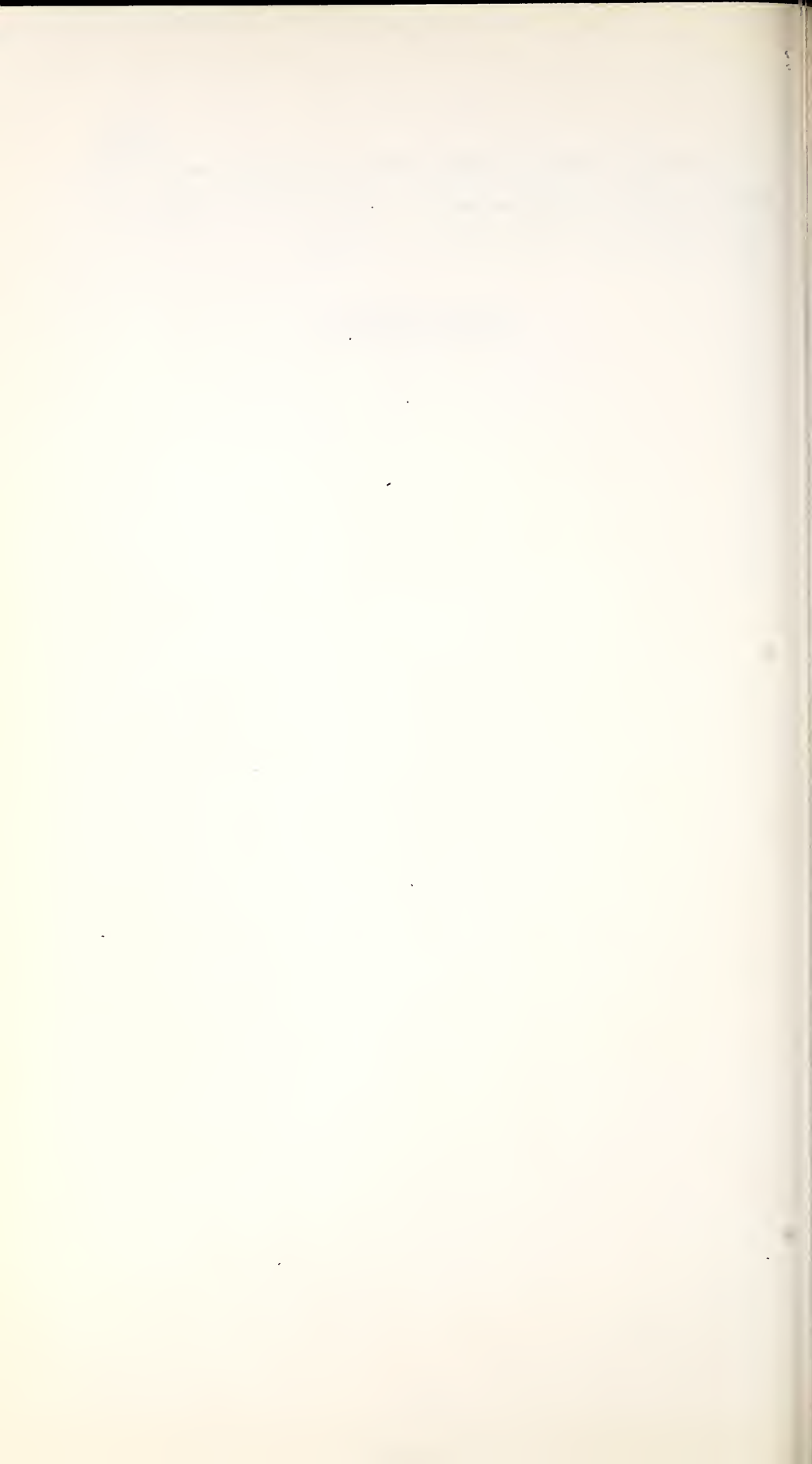
A review of the testimony shows that the evidence was conflicting and cannot be reconciled. Under such circumstances, in a bench trial it is the duty of the trial court to determine the credibility of the witnesses and the weight to be given their testimony. (People v. Catlett, 48 Ill. 2d 56, 268 N.E.2d 378; People v. Arndt, 50 Ill. 2d 390, 280 N.E.2d 230; People v. Spriggs, 20 Ill. App. 3d 804, 314 N.E.2d 573.) On appeal, the determination of the trial judge, who had the opportunity to view the witnesses and hear their testimony, will not be lightly set aside. (People v. McGhee, 20 Ill. App. 3d 915, 314 N.E.2d 313; People v. McNeal, 8 Ill. App. 3d 109, 289 N.E.2d 193.) Here, the trial judge found the testimony of the State's witnesses believable and accepted their version of the theft. In light of the record, it was not error for the trial court to find that defendant was guilty beyond a reasonable doubt.

We have examined the record and brief and agree with the Public Defender's conclusion that an appeal on the issue of whether defendant was found guilty beyond a reasonable doubt would be frivolous and without merit. Further, our examination of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.



The Public Defender of Cook County is granted leave to withdraw as counsel for the defendant on appeal and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;  
JUDGMENT AFFIRMED



No. 60266

3D  
30 I.A. 726



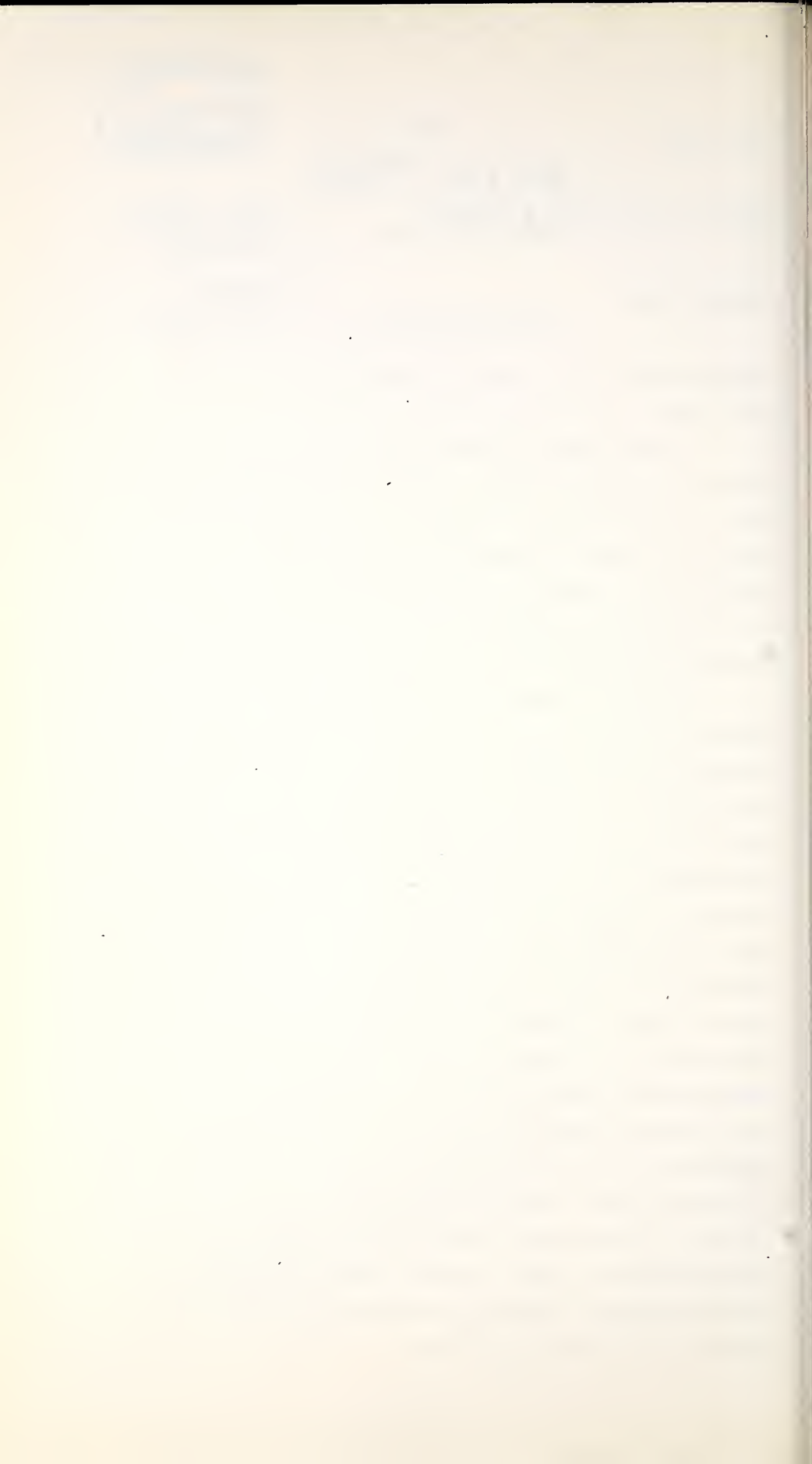
PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.	)	
	)	HONORABLE
PRESTON SYKES,	)	DAVID CERDA,
Defendant-Appellant.	)	JUDGE PRESIDING.

BEFORE DOWNING, P.J., STAMOS, and LEIGHTON, JJ.

PER CURIAM

Preston Sykes, defendant, was found guilty after a bench trial of the crime of theft. (Ill. Rev. Stat. 1973, ch. 38, par. 16-1(a)(1).) He was placed on probation for a period of one year. Defendant appeals arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt, and that the State failed to prove the corporate existence of Community Discount Center, the owner of the property involved.

At trial, Michael J. Roberts, a security agent for Community Discount Center, located at 4646 South Halsted, Chicago, Illinois, testified that on February 28, 1974, at approximately 3:00 P.M., he observed the defendant enter the Community Discount Store with two companions. At that time the defendant was wearing a shirt and pants, but no jacket. Defendant proceeded to the men's wear section, where he took a black vinyl man's jacket off the rack and put it on. Wearing the jacket, defendant proceeded to the shoe department where he picked up several items. Defendant next proceeded to the cashier, where he stated that the jacket was his. After leaving the cashier, defendant was stopped by Roberts as he attempted to leave the store without paying for the jacket. The Chicago police were called and took the defendant into custody. The value of the jacket was \$16.97. Roberts testified that there were two price tags on the jacket which had been removed, but that he did not see the defendant remove the tags. Roberts testified that Community Discount Center is a business entity licensed to do business in the State of Illinois.



Moses Bradley and James Hellon testified that on February 28, 1974, they went to the Community Shopping Center with the defendant. Before they entered the store the defendant was wearing a black vinyl jacket.

Ruby Sykes, the defendant's wife, testified that the Saturday before defendant was placed under arrest he had purchased a black vinyl jacket from Community Discount Center, and that on February 28, 1974, when defendant left the house, he was wearing the jacket.

Marjorie Wright, the defendant's sister, testified that several days before defendant was placed under arrest he came to her house, and at that time he was wearing a black vinyl jacket.

Defendant testified that the Saturday before he was placed under arrest he bought a black vinyl jacket from Community Discount Center. On February 28, 1974, he went to the Community Discount store. At that time he was wearing the jacket he had previously purchased. As he attempted to leave the store, he was placed under arrest. Defendant denied that he stole the jacket.

Defendant's first contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. The rule is well established and has often been stated that in a bench trial the credibility of witnesses is for the trier of fact to determine, and his determination will not be disturbed on review unless it is based upon evidence which is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. (People v. Clark, 52 Ill. 2d 374, 288 N.E.2d 363; People v. Wright, 3 Ill. App. 3d 262, 278 N.E.2d 175.) The testimony of a single witness is sufficient to sustain a conviction if positive and credible. People v. Abrams, 21 Ill. App. 3d 734, 316 N.E.2d 5; People v. Garmon, 19 Ill. App. 3d 192, 311 N.E. 2d 299.





In the case at bar, the testimony of Michael J. Roberts was positive and credible. He testified that on February 28, 1974, he observed the defendant enter the Community Discount store. At the time defendant entered the store he was not wearing a jacket. Defendant proceeded to the men's department, where he took a black vinyl jacket off a rack and put it on. Thereafter defendant went to the shoe department, where he picked up several items and then walked to the cashier. While at the cashier, defendant stated that the jacket was his. Defendant was then stopped by Roberts as he attempted to leave the store without paying for the jacket. While defendant and several defense witnesses testified that the defendant did not steal the jacket but had previously purchased it, this was insufficient to create a reasonable doubt as to his guilt, since the trial judge is not obliged to believe the defendant's testimony and that of his witnesses. (People v. Lahori, 13 Ill. App. 3d 572, 300 N.E.2d 761; People v. Kaprelian, 6 Ill. App. 3d 1066, 286 N.E.2d 613.) Here, the trial judge, after hearing all the testimony adduced at trial, found the evidence sufficient to establish defendant's guilt beyond a reasonable doubt. After a complete review of the record, we cannot say that his determination was erroneous.

Defendant's second contention is that the State failed to prove the corporate existence of the owner of the property as alleged in the complaint. The complaint charged that the property was owned by "Community Discount Centers, Incorporation, a Delaware corporation, a corporation licensed to do business in the State of Illinois."

In People v. Sims, \_\_\_ Ill. App. 3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (No. 60104, decided June 5, 1975), the defendant was convicted of theft from a Jewel Food Store. On appeal defendant argued that the State had failed to prove the corporate existence of Jewel Food Stores as alleged in the complaint. The complaining witness, an employee of Jewel, who was the only witness for the



State, made frequent references in his testimony to Jewel Food Stores, but was not asked about Jewel's corporate existence. After analysis of all of the cases in the area, this court concluded that the prescriptions formerly associated with proof of a corporation's existence are no longer required in this State. This court rejected the defendant's contention and held the evidence sufficient to satisfy the material allegations of the complaint.

In the case at bar, Roberts testified that Community Discount Center is a business entity licensed to do business in the State of Illinois and that the property involved belonged to Community Discount Center. His testimony was sufficient to establish the material allegations of the complaint. In our opinion, based upon the complaint and the testimony at the trial, the defendant is fully protected from any possible double jeopardy.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.'

Judgment affirmed.



3D  
30 I.A. 727



61333

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM
Plaintiff-Appellee,	)	
	)	CIRCUIT COURT,
v.	)	
	)	COOK COUNTY.
ANDREW BASS and HERMAN MONTGOMERY,	)	
	)	Hon. Louis B. Garippo,
Defendants-Appellants.	)	Presiding.

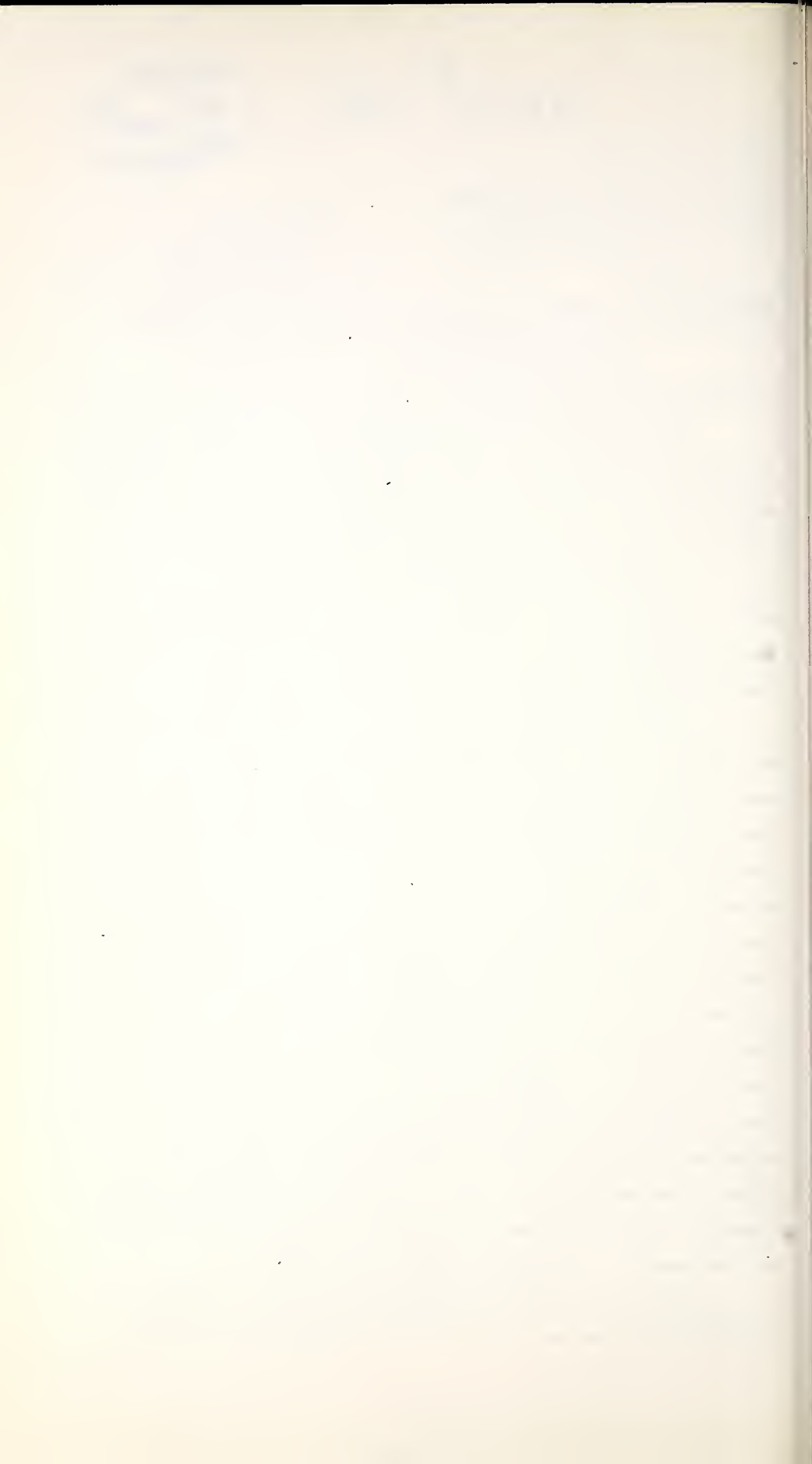
Mr. PRESIDING JUSTICE DIERINGER delivered the opinion of the court:

The defendants Andrew Bass and Herman Montgomery appeal from a judgment entered by the Circuit Court of Cook County finding the defendants guilty of burglary. Both defendants were sentenced to a term of one to four years in the Illinois State Penitentiary.

A Public Defender was appointed to represent the two defendants. Prior to trial, the court personally addressed both defendants and explained to each his right to trial by jury. Both defendants expressly waived their right to a jury trial.

At trial, Chicago Police Officer John McIntyre testified that on July 21, 1973, at approximately 6:30 a.m. he and his partner were driving in the 1500 block of West Madison Street in Chicago, when they observed defendant Herman Montgomery coming out of the Woolworth Store through a broken window. The officers searched defendant Montgomery and found several items with Woolworth price tags on them. The officers then placed him under arrest. After placing defendant Montgomery into their squad car, the police officers went to the open window and looked inside. Officer McIntyre testified he then observed defendant Andrew Bass inside the store carrying a shopping bag. The shopping bag contained 42 items with Woolworth price tags on them. The officers then placed defendant Bass under arrest. Both defendants denied entering the store on the morning in question. The trial court found both defendants guilty of burglary and sentenced them to a term of one to four years in the Illinois State Penitentiary.

The Public Defender now seeks to withdraw as counsel for the defendants and has filed a brief in support of his motion



pursuant to the case of Anders v. California, (1967) 386 U.S. 738. He states the only possible basis for appeal would be whether the testimony of Officer McIntyre was sufficient to find the defendants guilty beyond a reasonable doubt. He concludes the testimony of Officer McIntyre was credible and therefore sufficient to convict the defendants, and the appeal is without merit.

It is well settled in Illinois that the testimony of a single witness, if positive and credible, is sufficient to convict even if the witness is contradicted by the accused. (People v. Turner, (1970) 121 Ill. App.2d 205.) The testimony of Officer McIntyre in the present case was clear and convincing as to both defendants, and was sufficient to find them guilty beyond a reasonable doubt.

In criminal cases where a jury is waived, the credibility of the witnesses and weight to be accorded their testimony are matters to be determined by the trial judge. The judgment of the trial court will not be disturbed by a reviewing court unless the evidence is so improbable or unreasonable as to create a reasonable doubt of a defendant's guilt. (People v. Arroyo, (1974) 18 Ill. App.3d 187.) In the present case, the trial judge found Officer McIntyre to be more credible than both defendants.

The defendants both received a copy of the Public Defender's motion and brief and were also sent a letter advising them they had until June 13, 1975, to file any argument and authority in support of their appeal, but neither defendant has chosen to do so.

After an examination of the record, we conclude the Public Defender is correct and there is no merit to the appeal. The motion of the Public Defender to withdraw as counsel for the defendants is allowed, and the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED

Abstract only

JOHNSON and ADESKO, JJ., concur.





3D

30 I.A. 728



61517

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.	)	
	)	
LOUIS CHIAVOLA,	)	HONORABLE MAURICE D. POMPEY,
	)	Presiding.
	)	
Defendant-Appellant.)	)	

BEFORE DOWNING, P.J., STAMOS and LEIGHTON, JJ.

PER CURIAM:

Louis Chiavola, defendant, waived a jury trial and pleaded guilty to the crime of burglary in violation of Section 19-1 of the Criminal Code. (Ill. Rev. Stat. 1973, ch. 38, par. 19-1.) Defendant was placed on probation for a period of three years.

On October 1, 1974, defendant filed a notice of appeal and the Public Defender of Cook County was appointed to represent him. After examining the record, the Public Defender filed a petition in this court to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the petition also was filed. Defendant was mailed copies of the petition and brief on April 22, 1975. He was informed he had until June 27, 1975 to file any additional points he might choose in support of his appeal. He has not responded.

The record discloses that defendant and his private counsel appeared at a hearing held on September 3, 1974. The assistant State's Attorney advised the court that defendant desired to plead guilty to a burglary information, which the State requested be filed instant. In a negotiated plea, it was agreed that defendant would receive a sentence of three years probation and the State would S.O.L. the other pending



felony matters. Defendant's attorney verified the agreement and defendant executed a Specification for Probation Certificate.

The trial court informed defendant he would ask him several questions and said that defendant should inform the court if he did not understand them. The court advised defendant he was charged with the offense of burglary; and that he had a right to a Grand Jury indictment, unless defendant waived such indictment. The defendant waived his right to an indictment and executed a Waiver of Indictment.

The court then asked defendant how he would plead and defendant answered "Guilty, Your Honor." The court told defendant he could be fined up to \$10,000, imprisoned for one to twenty years, or both, with a parole of three years. Defendant stated that he still wished to plead guilty, even though advised of his right to plead not guilty to the charge. Defendant stated he knew that if he pleaded guilty there would not be a trial of any kind and he would be waiving his right to a trial by jury and the right to be confronted with the witnesses against him, but he still persisted in his plea of guilty and signed a Jury Waiver. In response to questions by the court, defendant stated no threats, coercions, or promises had been made to him by the State's Attorney or his own attorney or anyone else in order to induce him to enter a plea of guilty. The State informed the court that under the plea agreement defendant was to be placed on felony probation for a period of three years. Defendant's counsel stated that was the agreement.

In response to the court's request for a statement of the facts, the assistant State's Attorney stated that on July 10, 1974, defendant was arrested in the premises of 3935 West Division, Chicago; that at the time he was attempting to exit the rear of the premises; and that he had certain articles in his hand. Counsel for defendant stipulated to said facts.



Defendant waived a pre-sentence investigation and executed a written waiver to that effect. Counsel for defendant also waived a hearing on aggravation and mitigation.

The trial court accepted the plea of guilty, concurred in the plea agreement, entered a finding of guilty of burglary, entered judgment on the finding and sentenced defendant to three years felony probation. The trial court advised defendant of the consequences if he violated the terms of the probation.

The Public Defender states that the only possible ground for appeal might be a failure of the trial court to comply with the provisions of Supreme Court Rule 402. This is based on the fact that the record discloses the trial court advised defendant he was charged with "burglary" but the court did not detail the specifics of the charge.

Supreme Court Rule 402 sets forth the procedure which must be followed by the trial court in accepting a plea of guilty. (Ill. Rev. Stat. 1973, ch. 110A, par. 402.) However, the rule requires only substantial compliance with its terms. People v. Krantz, 58 Ill.2d 187, 317 N.E.2d 559.

In People v. New, 25 Ill.App.3d 605, 323 N.E.2d 550, the court held the trial court's statement that the indictment charged the defendant with the crimes of rape and robbery was sufficient to apprise him of the nature of the crimes charged and, therefore, the defendant was properly admonished in accordance with the provisions of Rule 402. In the recent case of People v. Robinson, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (No. 59196, May 5, 1975), this court held that there was substantial compliance with Rule 402 when the trial court merely named the offense charged; and that, even had there not been, the error did not harm or prejudice defendant and was not, therefore, reversible error. Likewise, in the case at bar, there was substantial compliance with Rule 402 when the trial court



merely named the offense charged. Further, even had there not been substantial compliance, the record discloses the error did not harm or prejudice defendant and, therefore, was not reversible error.

The record discloses that the trial court fully admonished defendant including the fact that defendant could be imprisoned "from one year to twenty years, or both, with a parole of three years." This admonishment was in substantial compliance with the recent opinion of People v. Wills, \_\_\_ Ill.2d \_\_\_, \_\_\_ N.E.2d \_\_\_ (No. 47039, May 19, 1975).

We have examined the record and brief and agree with the Public Defender's conclusion that an appeal on the issue of whether the trial court complied with Supreme Court Rule 402 would be without merit. Further, our examination of the record does not disclose any additional possible grounds for an appeal which would not be frivolous.

The Public Defender of Cook County is granted leave to withdraw as counsel for defendant on appeal and the judgment of the Circuit Court of Cook County is affirmed.

MOTION ALLOWED;  
JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY.

7/15/1975  
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61459

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Respondent-Appellee, )  
 )  
v. )  
 )  
HARRY HAYES, )  
 )  
Petitioner-Appellant. )

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

HONORABLE  
DANIEL J. RYAN,  
Presiding.

PER CURIAM.

Before MCGLOON, P.J., McNAMARA and MEJDA, JJ.

Harry Hayes, petitioner, after a bench trial, was found guilty of the offense of murder and sentenced to a term of 25 to 50 years; on direct appeal this court affirmed that judgment. (See People v. Hayes (1972), 3 Ill.App. 3d 1027, 279 N.E. 2d 768.) His subsequently filed and unamended pro se post-conviction petition was dismissed without an evidentiary hearing on the State's motion, and petitioner brought the instant appeal from that dismissal. Ill. Rev. Stat. 1973, ch. 38, pars. 122-1 et seq.

The Public Defender of Cook County was appointed as counsel for petitioner on this appeal. Appellate counsel has filed in this court a motion for leave to withdraw, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, advancing as the sole issue which could be raised on appeal the length of the sentence imposed and concluding that that issue is without merit and the appeal frivolous. Copies of counsel's motion and brief were forwarded to petitioner, and he was allowed time to file any points in support of the appeal; he has responded with a pro se brief, raising as issues the competency of his counsel at the trial and on the direct appeal from his conviction.

The pro se post-conviction petition filed subsequent to this court's opinion affirming the judgment on direct appeal alleged a



violation of petitioner's constitutional rights in that the sentence of 25 to 50 years failed to conform to the Illinois constitutional mandate that penalties be imposed with a view toward restoring offenders to society, and that it failed to conform to the standard of the American Bar Association relating to the one-to-three ratio between minimum and maximum sentences. Petitioner's counsel in the post-conviction proceedings filed a certificate of counsel pursuant to Supreme Court Rule 651(c), wherein he stated that he conferred with petitioner personally and by mail, reviewed the transcript of proceedings at trial and the record of the direct appeal, and concluded that the pro se petition adequately presented the sole issue of constitutional magnitude which could be raised in this matter.

Ill. Rev. Stat. 1973, ch. 110A, par. 651(c).

At the hearing on the State's motion to dismiss the post-conviction petition before the same judge who presided over the trial, petitioner's counsel argued that petitioner was on the way toward rehabilitation and should be sentenced according to the provisions of the Unified Code of Corrections, citing People v. Chupich (1973), 53 Ill. 2d 572, 295 N.E. 2d 1. The State argued at that hearing that the question of duration of sentence was not cognizable in a post-conviction proceeding.

We are in agreement with appellate counsel's position that the question of the duration of petitioner's sentence cannot be raised in a post-conviction proceeding. The sentence imposed was clearly within the limits of the penalty prescribed by the statute defining the offense of murder. (See Ill. Rev. Stat. 1969, ch. 38, par. 9-1.) Further, as we noted in our opinion affirming the judgment of conviction, petitioner pointed the gun at and shot the victim in the head while the latter was tied and lying on the ground. Under these circumstances and as it has been consistently held, excessiveness of sentence alone is not grounds for relief under the Post-Conviction



Hearing Act. People v. Ballinger (1973), 53 Ill. 2d 388, 292 N.E. 2d 400; People v. Null (1973), 13 Ill.App. 3d 60, 299 N.E. 2d 792; People v. Murry (1972), 5 Ill.App. 3d 64, 283 N.E. 2d 98.

The arguments advanced in petitioner's pro se brief on this appeal are likewise without merit and will not support the instant appeal. His attack on the competency of his trial counsel is barred by the doctrine of res judicata. That question was expressly raised and ruled upon in the direct appeal to this court from the murder conviction. People v. Mitchell (1973), 11 Ill.App. 3d 40, 295 N.E. 2d 517 (abst.).

Petitioner's attack on the competency of his counsel on the direct appeal is predicated upon allegations unsupported by the record or by affidavit or other evidentiary matter. His argument in this regard, raised for the first time on this appeal, consists of bald assertions which are in large part refuted by the record and by this court's opinion in the direct appeal. It clearly appears that petitioner received competent assistance of counsel on the direct appeal from the judgment of conviction.

In attacking the competency of his counsel at trial and on the direct appeal petitioner indirectly challenges the sufficiency of the evidence adduced by the State. That question was also raised in the direct appeal and decided adversely to petitioner by this court, and is also barred by the doctrine of res judicata. People v. Mitchell, supra.

In discharge of our responsibility under the Anders decision, an independent review of the instant record discloses no grounds which could be raised in support of the instant appeal. We conclude that the appeal is frivolous.



For the foregoing reasons, the motion of the Public Defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed, and the judgment of the circuit court dismissing the pro se post-conviction petition without an evidentiary hearing is affirmed.

Motion allowed;  
judgment affirmed.





PER CURIAM: FIRST DISTRICT, FIFTH DIVISION.  
BEFORE DRUCKER, J., LORENZ, J., AND SULLIVAN, J.



At approximately 3:20 P.M. they were walking through the alley between Halsted and Green Streets on their way to pick up Walker's cousin at the John Molt School when five or six boys, one of whom Walker identified as defendant, walked up behind them. They continued to walk through the alley when two other boys appeared in front of them. The boys stated that they represented the Cobra Stones gang. One of the boys then hit Carl Pete in the back of the head. At that time defendant, who was standing three and one-half feet from Pete, pulled out a gun from his belt and fired one shot at Carl Pete. Defendant was wearing a green windbreaker. Walker testified that immediately after the shooting he and A. C. ran back to his home. Walker testified that later that same day he viewed a lineup of four boys and identified defendant as the person who shot and killed Pete.

Andrew Lillard, also known as A. C., testified that on the afternoon of September 8, 1972, he left Tilden High School with Carl Pete and John Walker. As the three boys were walking through an alley between Halsted and Green, five or six boys, one of whom he later identified as defendant, came up behind them. Two boys then came up in front of them and hollered out "Cobra Stones." One of the boys in the back asked if they were all right, and another boy responded that they were all okay except one. One of the boys then hit Carl Pete in the back of the head. Carl Pete tried to grab the boy who had hit him, but the boy jumped aside and said, "Burn him." At that time defendant, who was standing approximately four feet from Pete, pulled out a gun from his waist and fired one shot at Pete's head. One of the other boys pulled out a gun and attempted to fire at Lillard, but the gun misfired. Lillard testified that later that same day he viewed a lineup of four men at the police station and identified defendant as the person he had seen shoot Pete.



James Doyle, a Chicago police investigator, testified that on September 8, 1972, he and his partner, Officer Walter Zamolewicz, answered a radio broadcast of a man shot at 55th and Green Streets. In the alley he observed the body of Carl Dennis Pete. Pete had a bullet hole under his eye.

Herbert Bailey, a Chicago police officer, testified that on September 8, 1972, he and his partner, Officer Lawrence Hill, were assigned the investigation of the shooting of Pete. At approximately 8:00 P.M. that evening, in the vicinity of 828 West 55th Street, he placed defendant under arrest. Defendant was transported to the Seventh District police station where a lineup of four men was conducted. Lillard and Walker viewed the lineup separately and both identified defendant as the man they had seen shoot Pete.

Dr. Pascual Culala testified that he is a pathologist for the Coroner of Cook County. On September 9, 1972, he observed and supervised the autopsy of Pete. The autopsy was performed by his trainee, Dr. Constantinov. An external examination of the body of Pete revealed a bullet hole entering at about the middle aspect of the lower lid of the left eye. An internal examination revealed that the bullet penetrated the left side of the head with extensive lacerations to the brain. Dr. Culala testified that based upon his past medical experience and his internal and external observations of the body of Pete, it was his opinion that Pete died as a result of a bullet wound of the head that went through and extensively lacerated the brain. Dr. Culala testified that a coroner's protocol was prepared and signed by Dr. Constantinov. Prior to testifying, Dr. Culala had read the coroner's protocol prepared by Dr. Constantinov. Dr. Culala testified that after refreshing his recollection from the coroner's protocol, he was testifying as to his personal observations of the deceased.

Ernest Boyd testified for the defense that he is presently



incarcerated in the Juvenile Division of the Illinois Department of Corrections as a result of his plea of guilty to the charge of involuntary manslaughter in juvenile court proceedings relating to the death of Carl Dennis Pete. Boyd testified that he was present when Pete was shot, and that defendant did not shoot him. On cross-examination Boyd testified that he had previously stated that he had shot Pete, but these statements were not true, and that he initially stated that he had shot Pete because he figured "if [defendant] do some time I can do some, too. . . ." Prior to September 8, 1972, Boyd did not know and had never had any trouble with Pete.

Keith Samuel Lanier and Darcel Chapel testified that on September 8, 1972, at approximately 3:30 P.M., they were present when Pete was shot. At that time defendant was present but did not shoot Pete.

Reverend Daniel J. Mallette, the pastor of Visitation Church, testified that he had known the defendant for the past year. He testified that defendant's reputation in the area for truth and veracity is good.

Defendant testified that on September 8, 1972, he and some other boys were walking down Halsted Street. As they came to an alley the other boys turned down the alley. Defendant stated that he and a second boy went down Green Street and entered the alley from the other direction. Defendant stated that he heard somebody say that the man with the hat on was not all right. At that time Pete swung at him with an umbrella, and another boy hit Pete in the head. Defendant stated that he backed up and pulled out a .22 caliber revolver, when he heard a shot come from behind him. Defendant stated that he did not at any time fire his weapon.

In rebuttal Assistant State's Attorney Maurice M. Dore testified that in the early morning hours of September 9, 1972, he





took a written statement from Ernest Boyd. At that time Boyd stated that he did not know whether or not defendant was present in the alley when Pete was shot.

John Olson, a Chicago police investigator, testified that in the early morning hours of September 9, 1972, he was present when Dore took a statement from Boyd that a week prior to the killing of Pete he had been beaten up by Pete. Boyd stated that on the day of the killing he was chased into the alley by Pete and three other individuals. Thereafter Boyd went back into the alley with another group of boys and together they fired upon Pete.

Brian Silverman, an assistant public defender, testified that he represented Boyd in the juvenile court proceedings relating to the death of Pete. On December 21, 1972, defendant entered an admission of guilt to a delinquency petition alleging involuntary manslaughter. Boyd had originally been charged with murder. Silverman testified that after Boyd informed him that Boyd was not the person who shot Pete, he had a plea bargaining conference with the State's Attorney's office. The State agreed to reduce the charge of murder to involuntary manslaughter based upon the theory of accountability. Silverman testified that thereafter, based upon his advice, Boyd entered the admission of guilt to the reduced charge.

#### Opinion

Defendant's first contention is that he was denied his right to confrontation when Dr. Pascual Culala was allowed to testify as to the cause of death when he neither performed the autopsy nor wrote the coroner's report. Defendant's argument does not find support in the trial record. Dr. Culala testified that on September 9, 1972, he was physically present to observe and supervise the autopsy of Carl Dennis Pete. The autopsy was performed by his trainee, Dr. Constantinov. Dr. Culala testified



that an external observation of the body revealed a bullet hole entering the middle aspect of the lower lid of the left eye. An internal examination of the body revealed that the bullet penetrated the left side of the head with extensive laceration to the brain. Dr. Culala testified that based upon his past experience and his personal internal and external observations of the body, it was his opinion that Pete died as a result of a bullet wound to the head which extensively lacerated the brain.

After a review of the record, it is obvious that Dr. Culala testified from his personal observations. Under these circumstances his testimony was clearly not hearsay. While he refreshed his memory by reading the coroner's protocol dictated by Dr. Constantinov, this does not render his testimony improper. The rule is well established that a witness can refresh his memory by using any document. (People v. Jenkins, 10 Ill. App.3d 166, 294 N.E.2d 24.) Here Dr. Culala testified that after refreshing his recollection from the coroner's protocol, he was testifying as to his personal observations of the deceased. Defendant was not denied his right to confrontation by the testimony of Dr. Culala.

Defendant's second contention is that under the theory of collateral estoppel the conviction of Boyd on the charge of involuntary manslaughter in juvenile court proceedings barred a subsequent determination that the defendant is guilty of murder. Defendant argues that the finding of guilty entered as to Boyd decided that Boyd killed the deceased, and that at the time of the killing he did not possess the mental state required for the crime of murder. We cannot accept defendant's theory. Collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any subsequent lawsuit. People v. Grayson, 58 Ill.2d 260, 319 N.E.2d 43.



In the case at bar defendant was not a party to the juvenile court proceedings at which Boyd was convicted. Therefore, the doctrine of collateral estoppel does not apply. Further, the conviction at a joint trial of one defendant on the charge of murder and a second defendant on the charge of manslaughter has been held to be proper. (People v. Clements, 316 Ill. 232, 147 N.E. 99.) Here defendant and Boyd were not tried together, and it is obvious that the proof as to each was not identical. Boyd entered a negotiated plea of guilty in juvenile court proceedings; therefore, no testimony was adduced at his trial. In addition, at defendant's trial Boyd testified that he did not fire the shot that killed Pete. Under these circumstances the fact that Boyd was convicted of involuntary manslaughter as a result of a negotiated plea of guilty does not in any manner act as a bar to defendant's subsequent conviction for murder.

Defendant's final contention is that his sentence of 50 to 100 years, imposed for the charge of murder, was excessive in view of his age and lack of criminal background. While this court has the power to reduce sentences (Ill. Rev. Stat. 1973, ch. 110A, par. 615(b)), that power should be exercised with care and only where it is manifest in the record that the sentence is excessive. (People v. Fox, 48 Ill.2d 239, 269 N.E.2d 720; People v. Conway, 3 Ill. App. 3d 69, 278 N.E.2d 852.) The trial judge who heard the testimony and matters presented in aggravation and mitigation is ordinarily in a better position than a reviewing court to determine the punishment to be imposed. People v. Winfield, 133 Ill. App.2d 48, 272 N.E.2d 848.

In the case at bar the State, in aggravation, pointed to the ruthless nature of the offense. Specifically, it was pointed out that defendant, following a premeditated plan, trapped Pete in an alley, that defendant shot Pete in the head from a distance of



four feet merely because Pete did not belong to a street gang, and that Pete had offered no resistance. Defendant's only response in mitigation was that he is a young man from a good family.

The sentence imposed upon defendant was within the statutory limits for the crime of murder. After a careful review of all of the evidence adduced at trial and during the hearing in aggravation, we do not believe that the sentence imposed by the trial judge was improper or that it is at great disparity with other sentences imposed for similar offenses. See People v. Sprinkle, 56 Ill.2d 257, 307 N.E.2d 161.

For the foregoing reasons the judgment entered below is affirmed.

AFFIRMED.

Abstract only.





3D  
30 I.A. 787



61562

PEOPLE OF THE STATE OF ILLINOIS, )  
Plaintiff-Appellee, )  
v. )  
EDDIE HOWARD, )  
Defendant-Appellant. )

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

HONORABLE  
JAMES A. CONDON,  
Presiding.

PER CURIAM.

Before MCGLOON, P.J., McNAMARA and MEJDA, J.J.

Defendant, Eddie Howard, after a bench trial, was found guilty of unlawful use of weapons, i.e., carrying/possessing a loaded firearm on or about his person in violation of section 24-1(a)(10) of the Criminal Code (Ill.Rev.Stat. 1973, ch. 38, par. 24-1(a)(10)). He was sentenced to a term of one year in the House of Correction.

The Public Defender of Cook County was appointed as counsel for defendant on this appeal. Appellate counsel has filed in this court a motion for leave to withdraw, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, advancing as the sole issue which could be raised on appeal the question of whether the trial court erred in denying defendant's motion to suppress the gun as evidence, and concluding that that issue is without merit and the appeal frivolous. Copies of the motion and the brief were forwarded to defendant on April 10, 1975, and he was allowed until June 16, 1975 to file any points in support of the appeal; as of July 3, 1975 he has not responded.

At the hearing on the motion to suppress as evidence the gun seized from defendant's possession, the arresting police officer testified that he had been investigating a report of a robbery in progress and that about 10 minutes later, a block and a



half away from the scene, he observed the defendant and a companion alight from a cab and walk fast toward an address. Defendant's clothing matched the description of that worn by one of the participants, and his companion's clothing was similar to that worn by the second participant. The officer searched the defendant, recovered the gun in question, and placed defendant under arrest.

Under these circumstances, it is clear that the arresting officer's stop of the defendant was justified, as was the search of defendant for the officer's own protection. A forceable felony had just been committed a short distance away in which defendant was reasonably suspected of having participated, and it was therefore reasonable for the officer to have believed that defendant might be "armed and presently dangerous." (See Ill. Rev. Stat. 1973, ch. 38, pars. 107-14, 108-1.01; People v. Lee (1971), 48 Ill. 2d 272, 275-276, 269 N.E. 2d 488.) An issue that the trial court erred in denying defendant's motion to suppress would be without merit and would not support the instant appeal.

In discharging our responsibility under the Anders decision we have independently reviewed the record and have noted a single matter which could be raised in support of an appeal, but which we may presently correct without the necessity of fully-briefed arguments. Ill. Rev. Stat. 1973, ch. 110A, par. 615(b)(4).

Defendant was found guilty of a Class A misdemeanor for which a sentence of "any term less than one year" may be imposed. (See Ill. Rev. Stat. 1973, ch. 38, pars. 24-1(a)(10), 24-1(b), 1005-8-3(a)(1).) The instant sentence, however, was imposed for a term of one year and is therefore excessive by one day. (See People v. Carr (1974), 17 Ill.App. 3d 533, 308 N.E. 2d 206 (abst.).) The sentence imposed upon defendant's conviction must therefore be reduced by one day.



No other matter has been found in our review of the record which could support an appeal in this case.

For the foregoing reasons, the motion of the Public Defender of Cook County for leave to withdraw as appellate counsel is allowed; the sentence imposed upon defendant's conviction is modified by the reduction of one day, to a term of 364 days, and the judgment of the circuit court of Cook County, as so modified, is affirmed.

Motion allowed;  
judgment affirmed,  
as modified.



3D  
30 I.A. 788



No. 61570

EUGENE TATAR and HELEN TATAR,	)	
Plaintiffs-Appellees	)	APPEAL FROM THE CIRCUIT
and Appellants,	)	COURT OF COOK COUNTY.
	)	
v.	)	HONORABLE
	)	SAMUEL B. EPSTEIN,
SOPHIE SZERLONG,	)	PRESIDING.
	)	
Defendant-Appellant	)	
and Appellee.	)	

MR. JUSTICE McNAMARA delivered the opinion of the court:

The plaintiffs, a daughter and her husband, filed an action in the circuit court of Cook County against her mother, the defendant. The suit was brought on a quantum meruit basis for services purportedly rendered by plaintiffs to defendant over a period of seventeen years. After a bench trial, the trial court rendered judgment in favor of the plaintiffs in the amount of \$19,000.

Plaintiffs appellees have failed to file an answering brief in this court. Ordinarily in such instances, this court, despite such failure to file a brief, will examine the record to determine the merits of the appeal. (Daley v. Richardson (1968), 193 Ill. App.2d 383, 243 N.E.2d 685.) However, in certain cases, this court has reversed pro forma without setting forth any additional reasons other than appellees' failure to submit a brief. (Bowling v. Hoop (1972), 2 Ill.App.3d 850, 277 N.E.2d 780; Gibraltar Corp. v. Flobudd Antiques, Inc. (1971), 131 Ill.App.2d 545, 269 N.E.2d 515.) In view of the mother-daughter relationship between the parties and in light of the failure of plaintiffs appellees to attempt to uphold a substantial money judgment, we believe the present case is appropriate for the latter action.

Accordingly, the judgment of the circuit court of Cook County is reversed pro forma.

Judgment reversed.

McGLOON, P.J., and MEJDA, J., concur.





UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice  
Honorable WALTER DIXON, Justice  
Honorable THOMAS J. MORAN, Justice  
LOREN J. STROTZ, Clerk  
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:  
On August 8, 1975 the Opinion of the Court was filed  
in the Clerk's office of said Court, in the words and figures  
following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
SECOND DIVISION

FILED

AUG 11 1975

LOREN L. STROTZ, Clerk  
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
v.	)	the 18th Judicial
	)	Circuit, DuPage
RICHARD J. DZIAK,	)	County, Illinois.
	)	
Defendant-Appellant.	)	

JUSTICE THOMAS J. MORAN delivered the opinion of the court:

After a bench trial, the defendant was adjudged guilty of theft and sentenced to a probationary term of one year. He appeals contending (1) section 16-1(a) of the Criminal Code is unconstitutional due to vagueness, (2) he should have been charged and convicted, if at all, under section 16-1(d), not 16-1(a) of the Criminal Code, and (3) he was not proven guilty beyond a reasonable doubt.

On August 2, 1973, Bruce Westphal's 10-speed bicycle was reported missing. On August 10, 1973, the defendant, while in the possession of a 10-speed bicycle, was arrested on an unrelated charge. A subsequent check on the ownership of the bike in defendant's possession revealed that Bruce Westphal was the owner. By complaint, defendant was charged with theft in violation of section 16-1(a)(1) of the Criminal Code. Ill. Rev. Stat. 1973, ch. 38, §16-1(a)(1).



At trial, the defendant took the stand in his own behalf.

He admitted that the bicycle identified as belonging to Bruce Westphal was found in his (defendant's) possession, explained that he had obtained the bicycle from John Higginson, and asserted that he had not stolen it from Westphal. On cross-examination, defendant revealed that he had given his older bike to Higginson in return for the 10-speed and that Higginson told him at the time of the exchange that the 10-speed was stolen.

Defendant asserts that section 16-1(a) is unconstitutionally vague in that it fails to give a person of ordinary intelligence fair notice of the precise conduct forbidden by the statute. The same issue was raised and found without merit in People v. Harden, 42 Ill. 2d 301, 303-04 (1969).

The defendant next contends that he should have been charged and convicted, if at all, under section 16-1(d) and not under section 16-1(a) in that the evidence proves that the original asportation was committed by another. The conduct specifically proscribed in section 16-1(d) is not a separate offense in Illinois, but is included within section 16-1(a). Under such circumstances, a person who violates section 16-1(d) may be charged and convicted of violating section 16-1(a). People v. Marino, 44 Ill. 2d 562, 576 (1970).

The defendant maintains that he was not proven guilty of theft beyond a reasonable doubt in that the State failed to prove that it was defendant who took the bicycle. The complaint charged defendant with theft in that he:

\*\*\*did knowingly exert unauthorized control over property of Bruce Westphal, being one Schwinn Racer type bike, serial MH529862, having a total value of less than \$150, with the intent to deprive said Bruce Westphal permanently of the use and benefit of said property."



The complaint correctly sets forth the essential elements of theft set forth in section 16-1(a) of the Criminal Code. Under this section, the State need only prove that the defendant did knowingly obtain or exert unauthorized control over the property and that defendant intended to permanently deprive the owner of the property's use or benefit. Ill. Rev. Stat. 1973, ch. 38, §16-1(a)(1).

The method by which unauthorized control is obtained or exerted is immaterial to a charge under section 16-1(a), and a charge under that section made in conjunction with one of the enumerated mental states would cover all forms of theft. (Committee Comments, S.H.A., ch. 38, §16-1, page 15.) "Obtains or exerts control" includes not only the taking of the property but also the carrying away, sale, or possession of the property. (Ill. Rev. Stat. 1973, ch. 38, §15-8.) Thus, a person other than the actor who initiates the wrongful asportation may be guilty of theft under section 16-1(a).

In the present cause, the defendant admitted that he exerted control over the property, and that he knew the control was unauthorized in that he did know the property to be stolen at the time he exerted such control. From these admissions and the evidence presented by the officer, we find that the State proved beyond a reasonable doubt that the defendant knowingly exerted unauthorized control over the property of another, and that defendant intended to keep the property, depriving the owner of its use or benefit. (See People v. Marino, supra, at 576.) Under such circumstances we find that the defendant was proven guilty of theft as charged pursuant to section 16-1(a)(1) of the Criminal Code.

Judgment affirmed.

RECHENMACHER, P.J., DIXON, J., concur





IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	:	Appeal from the Circuit Court for the
	:	Third Judicial Circuit, Madison County,
Plaintiff-Appellee,	:	Illinois.
	:	
vs.	:	
	:	
MARY ANN GIBBS, ET AL.,	:	The Honorable William E. Johnson,
	:	Judge Presiding.
Defendants-Appellants.	:	

JUSTICE EBERSPACHER delivered the opinion of the court:

This appeal is from the judgment and order of the circuit court of the Third Judicial Circuit of Madison County for the plaintiff on the plaintiff's Supplementary Petition to Terminate Parental Rights under the Juvenile Court Act. The court below terminated the parental rights and appointed a guardian with power to consent to adoption. The court thereafter refused to entertain any further petitions by the natural mother, Linda Gibbs Oliver.

The case involves the primary question of whether Linda Gibbs Oliver, hereinafter called the appellant, was properly found to be an "unfit person" within the meaning of Rev. Stats., 1973, ch. 4, §9.1-1D(b) and (f) on the grounds of "failure to maintain a reasonable degree of interest, concern, or responsibility as to the child[ren's] welfare," and "failure to protect the child[ren] from conditions within [their] environment injurious to the child[ren's] welfare."

The history of the appellant and her three children is one of constant involvement with the social services department of the State of Illinois. The appellant, born in 1948, came from a family of eight children, six of which were removed from the family under circumstances similar to these. She suffered brain damage as a child of eight in an automobile accident. She has had three children, two girls and one boy, by different fathers. She did not marry any of the fathers; instead she married one Merle Woodson Oliver. He had served six years for rape and one and one-half years for forgery.

In late 1966 she was admitted to Alton State Hospital for the second time after



"he had threatened to kill her two children because her boyfriend didn't like them."

In May, 1967, she was discharged as improved.

On October 13, 1971, the circuit court found that the appellant was not unwilling but rather unable and therefore, unfit, to care for, protect, and discipline her children. The court placed the children in the guardianship of the Illinois Guardianship-Administrator of the Department of Family Services.

Briefly stated, the facts of this case are that on October 26, 1971, at the age of 14, Belinda Lee Gleason (Linda's second daughter) was placed in foster care and was found by a foster mother and the foster mother's daughter to be suffering from a bad case of pinworm. She was also dirty, and was found to have a heavy yellow discharge from her vagina. She had vaginal bleeding and was in "quite a bit of pain". A direct smear was taken and diagnosed as gonorrhea. Two physicians later concurred that sexual contact was required to infect her.

When Belinda was first taken out of the appellant's custody, she told the foster mother that she had been subjected to sexual intercourse by appellant's brother, "Big Ed".

The appellant later contended that she had no knowledge of this action. Belinda told the foster mother and the foster mother's daughter that she had told both her grandmother and the appellant and had been told by both to be quiet about it.

There was also testimony that a man simply named "Dede" had used the children in a sexual manner with appellant's consent or apparent knowledge. Appellant's only comment was that Dede had been a friend of hers, but that she denied knowledge about any sexual acts allegedly committed by him upon the children.

In December, 1971, after the children had been placed in foster homes pursuant to the October, 1971, order, the appellant filed a petition alleging that she had not been allowed a sufficient number of visits of sufficient length with the children. The petition further charged that this denial of visits was done to lay a foundation for the termination of her parental rights.

The court dismissed the petition, but also provided that appellant should have

"\* \* \* one weekend visitation in her home with the minor children and that during such visitation the mother not permit Woody Oliver to be alone with the minor daughters and that he not be permitted in the same house from 8:00 P.M. to 8:00 A.M. while the minor daughters are there."

At that time the appellant had not married Woody Oliver, and was living with her father and with a friend, a Mrs. Brockman.



A visit took place in late February, and appellant simply did not meet the terms of that order. There is no dispute that Oliver was present during the prescribed permitted hours, and in fact was discovered asleep (albeit clothed) in the same bed with the two girls.

According to one witness, Mrs. Brockman, the night preceding this event the appellant had called up Mr. Oliver and told him where she was, and had asked him over to the house. It appears that Oliver had lived there for a period of time as a guest of Mr. and Mrs. Brockman. The appellant contended that he had been there when she first arrived from her father's house.

In any event, Oliver was at the house that night in violation of the order. Mrs. Brockman said that he had taken the girls upon his lap, and had proceeded to play with them between their legs. The witness wasn't sure whether the appellant knew what he was doing but the testimony was that the appellant told the girls to stay upon his lap, and be quiet. The witness claimed that a fight broke out over the acts when one of the alleged fathers, Walter Gleason, appeared on the scene and found out about the acts.

Testimony was that in a statement given to her caseworker concerning the weekend, the appellant stated that the children had all been under her direct supervision throughout the weekend and no difficulties during the visit had arisen. This was clearly false, and the appellant had knowledge of the falsity of the report.

Approximately one year after the caseworker learned of the sexual assault by Oliver over the February weekend, a petition to terminate parental rights was filed on March 20, 1973. The appellant was in Idaho at that time, upon learning of the pending action asked for a postponement so that she could get back to Illinois.

On July 2, 1973, the termination proceeding commenced, and the trial court found that on the basis of the facts set out that the appellant was an "unfit person" and entered its order terminating her rights.

The issues shall be considered in the order presented. First, was the trial court's order contrary to the manifest weight of the evidence?

The relationship of parent and child is one of the most important in our society. It has been consistently held that in proceedings to have a parent declared "unfit" where the object of that proceeding was to sever the relationship permanently, a clear and convincing case must be presented in strict compliance with the Adoption Act. This has



pen the burden applied where the grounds of unfitness have been abandonment and desertion, failing to maintain a reasonable degree of interest, concern and responsibility as to the children's welfare. (In re Overton, 21 Ill.App.3d 1014, 316 N.E.2d 201; In re Interest of Moriarity, 14 Ill.App.3d 553, 302 N.E.2d 491; In re Petition to Adopt (Ch), 8 Ill.App.3d 642, 291 N.E.2d 21; In re Deerwester, 131 Ill.App.2d 952, 267 N.E.2d 505; In re Adoption of Walpole, 5 Ill.App. 362, 125 N.E.2d 645.) Clearly, the same burden of proof should be applied where other grounds, such as "failure to protect children from conditions within their environment injurious to the child's welfare" are appropriate.

The question we face is the correctness of the trial court's determination that there was "clear and convincing proof" that the appellant was an "unfit parent" within the meaning of that term as defined in Illinois Revised Statutes, 1973, ch. 4, §9.1-1D under any of the grounds alleged. After examination of the record, we hold that the trial court's findings and orders are not against the manifest weight of the evidence and therefore are upheld.

In the case of In the Interest of Garmon, 4 Ill.App.3d 391, 280 N.E.2d 19, the court, at pages 395-396, discussed its reviewing function in cases such as these, and reviewed the facts of the case at pages 393 and 394. Those facts supported a finding of neglect and abuse sufficient to declare the parents unfit. In this case, that the mother evidenced a "failure to maintain a reasonable degree of interest, concern or responsibility as to the children's welfare, and failure to protect the child from conditions within his environment injurious to the children's welfare" is supported by the evidence.

Without reciting all the events in the appellant's life, it is enough to note that continued sexual imposition upon the children was alleged against a variety of men in appellant's life, including her brother, and a man she later married. Although there was sharply conflicting evidence concerning the February meeting, it is clear that the mother either could not or would not comply with the terms of the order, and that she lied to the caseworker concerning the events of that weekend. Regardless of whether Oliver actually did fondle the girls the night before at the party, he was discovered in bed with them in the morning.

In any event, one of appellant's daughters, Belinda, was found to have a heavy yellow vaginal discharge right after she was taken into foster care. Appellant maintained





that she hadn't noticed any such discharge when cleaning up the girls. The source of the problem was diagnosed as gonorrhea transmitted by sexual contact. The girl was also found to be dirty, and suffering from ring worm. Also the girl was, to some extent, bleeding from her vagina.

Appellant maintained that she knew nothing about any sexual activity. Belinda, on the other hand, told the foster mother and foster mother's daughter that she had been subjected to sexual intercourse by appellant's brother, Butch, and that when she told both her grandmother and her mother, both told her to be quiet or else Butch would be taken away.

Appellant's conduct clearly subjected her children to conditions within their environment which were hazardous and injurious to them, and she did not stop the conduct either because she could not or would not do so. Although she clearly did not abandon her interest in the children as is shown by her continued efforts to regain them, it is also clear that she did not maintain a reasonable degree of interest, concern or responsibility as to the children's welfare when she had them, and when she was allowed a visit by the children after they had been put in custody of foster parents.

Next, we consider whether the proceedings conform to the requirements of the Juvenile Court Act and the Adoption Act.

Appellant contends that only one ground of unfitness was alleged in the petition: failure to maintain a reasonable degree of interest, concern or responsibility as to the children's welfare. Appellant further contends that because the trial court's order listed the grounds of abandonment, desertion for more than three months, exhibiting substantial neglect continuously and repeatedly, failing to maintain a reasonable degree of interest, concern or responsibility as to the children's welfare, and failing to protect the children from conditions within their environment injurious to the children's welfare, Linda Gibbs' liver was prejudiced in her case.

Appellant relies on In re Petition of Smith, (1972), 4 Ill.App.3d 261, 264, 280 Ill.App.2d 770, 772, where the Court said:

"Petitioners contend that the evidence adduced at trial showed depravity of the respondent and therefore the trial court should have found respondent to be an 'unfit person'. Petitioners did not allege depravity as a ground for finding respondent unfit. In addition to the statutory requirement that where unfitness is alleged the ground therefor must be alleged, Ill.Rev.Stats., 1969, ch. 4, par. 9-1-5(b)(j), it has also been held that an issue cannot be sustained without a



corresponding pleading. Burke v. Burke, 12 Ill.2d 483, 147 N.E.2d 373. By failing to allege depravity as a ground of unfitness such was never placed in issue in the trial court, was not ruled upon there, and cannot, therefore, be urged for the first time on appeal."

Appellant in her brief fails to quote the last sentence in its entirety, but upon the sentence a basic distinction appears between the Smith case, and the case before us. In this case, the additional grounds were placed in issue in the trial court, and were ruled upon there, and therefore they are not urged for the first time on appeal.

Another important distinction is that in In re Petition of Smith, supra, the grounds of unfitness that were pled in the lower court were not supported by the facts. Here the grounds specifically alleged were proven, and in so proving these grounds, the other grounds became obvious to the trial court, albeit not specifically pled. The same evidential elements that tend to prove "failure to maintain a reasonable degree of interest, concern or responsibility as to the children's welfare", and "failure to protect the children from conditions within their environment injurious to the children's welfare" which were specifically pled are also some proof of "abandonment, desertion and exhibition of substantial neglect continuously and repeatedly (shown)".

A motion to amend the pleadings to conform to the findings of the trial court has been filed here by appellee. The Supreme Court Rule 366 (Ill.Rev.Stats., 1973, ch. 110A, §366(a)(1)) states:

"In all appeals the reviewing court may, in its discretion, and on such terms as it deems just:

(1) exercise all or any of the powers of amendment of the trial court."

One of the powers of amendment granted the trial court is contained in Ill.Rev. Stats., 1973, ch. 110, §46(3) where it is stated:

(3) "A pleading may be amended at any time, before or after judgment to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just."

However, appellee has not complied with the rules of amendment on appeal, specifically Rule 362 (Ill.Rev.Stats., 1973, ch. 110A, §362(b)), which provides in part:

"(b) Showing necessary. The application (to amend pleadings) and the affidavit in support thereof, must show the amendment to be necessary, that no prejudice will result to the adverse party if the amendment sought is permitted, and that the issue sought to be raised by the amendment are supported by the facts in the record on appeal. The amended pleading or process shall be presented with the application."



Appellee in his motion has made no showing of necessity, no showing that the theories in the amendment are supported by the facts, and no amended pleading is presented. There is no affirmative showing that no prejudice will result to the appellant-defendant. The motion is therefore denied.

This denial, however, does not require reversal of the original order in its entirety. Since both of the grounds specifically alleged have been proven, the order is reversed only insofar as it relies upon the additional three grounds found by the trial court but not alleged in the pleadings. Because only one ground must be proved to find a "unfit person", and that has been done in this case, the order should not be reversed in its entirety. The order, therefore, is affirmed.

We find from the record that the trial court properly informed Mr. Gleason of his rights as soon as it became aware of his appearance in open court during the termination proceedings. We do not, therefore, reach the question of whether appellant, Linda Gibbs Oliver, had standing to assert Walter Gleason's rights.

Finally, we shall consider whether the court below, after entry of an order terminating parental rights has continuing jurisdiction to entertain petitions by the natural parent based on changed circumstances.

Appellant filed two post trial motions. The first motion, a motion for reconsideration, was treated by the trial court as a motion for new trial and to reconsider on the basis of any alleged errors of law during the trial. The motion was denied properly.

The second motion, filed two months after the trial, was a petition for visitation. The trial court properly held that it did not have jurisdiction to make such an order.

The trial court based its position on the fact that an appeal had been taken on the case, and that said appeal divests the trial court of jurisdiction over matters necessarily involved in the review proceeding. Matters that are independent or collateral to the case may be determined by the trial court notwithstanding appeal, but matters directly involved by the case cannot be dealt with by the trial court after an appeal is taken as in the case here. (See, Arndt, v. Arndt, 331 Ill.App. 85, 72 N.E.2d 718.) As was stated in Shapiro v. Shapiro, 113 Ill.App.2d 374, 383, 252 N.E.2d 93, at page 98:

"\* \* \* the trial court is restrained from entering any order which would change or modify the judgment or its scope and from entering any order which would have the effect of interfering with the review of the judgment."



In this case granting visitation rights would necessarily change and modify the judgment. Also, visitation is clearly at issue in the main proceeding and is not independent or collateral to it.

But even if we assume, arguendo, that the visitation petition was not barred by the appeal, it is clear that the substantive law in Illinois has changed, and that all the rights, including visitation, are terminated by an order of termination of parental rights, even where that precedes the final adoption proceeding. Therefore, after granting the termination order, the court was unable to grant visitation rights since that parental rights just as all the other rights had been terminated.

It is no longer the adoption decree alone which can terminate all parental rights, but also the appointment of a guardian with power to consent to adoption will sever parental rights. (Ill.Rev.Stat., 1973, ch.37, §705-9.) This basic change in the final effect of the termination order is confirmed by the change in the Illinois Adoption Act. In 1953, Ill.Rev.Stats., ch. 4-1(3) provided:

"The natural parents of a child so adopted shall be deprived by the decree, of all legal rights, as respects the child, and the child shall be freed from all obligations of maintenance and obedience as respects such parents."

In 1973, the Ill.Rev.Stats., ch.4, §9.1-17 provided:

"Effect of order terminating parental rights or decree.

After entry either of an order terminating parental rights or the entry of a decree of adoption, the natural parents of a child sought to be adopted shall be relieved of all parental responsibility for such child and shall be deprived of all legal rights as respects the child, and the child shall be free from all obligations of maintenance and obedience as respects such natural parents."

The reason for the change in the statute is clear. Under the repealed statute, visitation and custody could still be sought until the very consummation of the adoption. The uncertainty and upheaval this avenue created was not beneficial for the children, the natural parents or the adoptive parents. The statute was changed to make the termination final, and for that reason the trial court properly refused to hear a petition for visitation rights.

Appellant's reliance upon In re Overton, 21 Ill.App.3d 1014, 316 N.E.2d 201, for the proposition that "where the court has not finally terminated all parental rights by a decree of adoption, the parents have a right to petition the Court for restoration of parental rights \* \* \*" (appellant-defendant's brief at page 26) is incorrect. In Overton,







3 Court actually held that:

"However, where the court has not terminated all legal rights of the parents in the child, the parents have a right to petition the court for restoration of parental rights (including visitation) and change of custody.

The (previous) order of court depriving the ~~rights of~~ parents of custody of their child is a continuing order which is only res judicata as to the facts." (At 206.)

That case dealt with custody; here the question is not custody, but rather termination of parental rights. The distinction is vital.

Appellant also maintains that the addition of subsection (1) of Ill.Rev.Stats., 1973, ch.4, sec. 9.1-1D creates a twenty-four month mandatory probationary period for natural parents in which to make "reasonable efforts to correct the conditions which were the basis for removal of the child from his parents or to make reasonable progress toward the return of the child to his parents." Appellant further contends at page 22 of appellant's reply brief:

"\* \* \* The Court should have considered her post-trial petitions to show 'reasonable efforts' and 'reasonable progress', or, more appropriately, dismissed the Petition (for termination) and required filing anew after twenty-four months had expired and allegations conforming to this provision."

We find no merit to these arguments. The legislative history of the enactment of subsection (1) does not disclose a legislative intent to create a twenty-four month probation period. Rather the change was made as an additional ground for finding a parent "unfit" under the definition. We do not agree that the subsection required a dismissal of the Petition for Termination, and a refiling twenty-four months hence.

It is our conclusion that the Order of Termination be sustained. The two grounds of unfitness specifically alleged as to Linda (Gibbs) Oliver were proven, and the findings of the trial court as to those two grounds are upheld as not being contrary to the manifest weight of the evidence.

The motion to amend the pleading by appellee to include an additional three grounds of abandonment, desertion, and exhibition of substantial neglect continuously and repeatedly is denied for failure to comply with Supreme Court Rule 362. The order of the trial court therefore is reversed on its finding of violations of the three grounds not specifically alleged in the petition. The order terminating the parental rights, however, is affirmed since the grounds that were specifically pled were proven.



The denial of the post trial motions for reconsideration, and visitation were properly denied by the trial court.

We find no reversible error, and the order is therefore affirmed.

Order Affirmed.

FORAN and KARNS, JJ., concur.

PUBLISH ABSTRACT ONLY



3D  
30 I.A. 898

74-8

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice  
Honorable WALTER DIXON, Justice  
Honorable THOMAS J. MORAN, Justice  
LOREN J. STROTZ, Clerk  
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On August 8, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
SECOND DIVISION

FILED

AUG 8 1975

LOREN J. STOLTZ, Clerk  
Appellate Court, 2nd District

MADELINE WHITSON,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Appeal from the
	)	Circuit Court of
U.S.I.F. ROCKFORD CORPORATION,	)	the 17th Judicial
a corporation, and DON E. MORSE,	)	Circuit, Winnebago
d/b/a MORSE EXCAVATING,	)	County, Illinois.
	)	
Defendants-Appellees.	)	

JUSTICE THOMAS J. MORAN delivered the opinion of the court:

After sustaining injuries in a fall on ice or snow in the Meadowmart parking lot, plaintiff sued defendants, U.S.I.F. Rockford Corporation (owner of Meadowmart Shopping Center) and Don E. Morse (d/b/a Morse Excavating) who was employed by U.S.I.F. to remove snow from the parking lot. Defendants filed a motion for summary judgment which was granted by the trial court on the ground that plaintiff was guilty of contributory negligence as a matter of law.

On appeal, plaintiff contends that the trial court committed reversible error in granting defendants' motion because, on the question of plaintiff's contributory negligence, there existed a genuine and material issue which should have been determined by a jury.





Plaintiff's deposition established that on February 11, 1970, she arrived at the shopping center and parked her car seven or eight stalls from the end of the first of several parking rows provided for customers. Against the cement blocks located at the head of each parking space, snow was piled to a height of about one foot and a width of approximately two feet. The balance of the parking lot was cleared. Rather than walk along the cleared lane to the end of the row, plaintiff cut through the snow piled against the cement parking blocks. After shopping, plaintiff, carrying her purse and a large box, once again climbed over the snow bank as she returned to her car. As she did so, she fell injuring her ankle. In her deposition, plaintiff admitted there was no reason for her to climb through the pile of snow, that she "really didn't stop to think whether [she] should walk around or above."

A summary judgment shall be entered if the pleadings, depositions, admissions and affidavits disclose no genuine issue as to any material fact. Ill. Rev. Stat. 1971, ch. 110, §57(3).

The standard for determining contributory negligence as a matter of law is whether, under the evidence, all reasonable persons would agree that the plaintiff had not used due care and caution for her own safety. Pollard v. Broadway Cent. Hotel Corp., 353 Ill. 312, 323 (1933); McGourty v. Chiapetti, 38 Ill. App. 2d 165, 175-76 (1962). This standard is applicable in those situations where plaintiff, by her own act, places herself either in a precarious position or exposes herself to a danger she might have avoided through the exercise of reasonable care. Ferguson v. Southwestern Bell Telephone Co., 8 Ill. App. 3d 890, 893 (1972).



By her own testimony, plaintiff admitted she was familiar with the layout of the parking lot and aware that the driving lanes were snow free. She could clearly see where she was stepping, and she freely chose to cross the snow bank rather than walk in the cleared area.

Plaintiff's injury was proximately caused by her lack of due care in choosing to walk upon the only area of the parking lot which presented a potentially dangerous situation.

"\*\*\*Where the danger is obvious to a person of ordinary intelligence, the law will charge [her] with the knowledge of it, and one cannot act, except at [her] peril, in a place of great danger and remain oblivious to an available alternative course of known safety which lay but steps away." Klimovich v. Crutcher, 57 Ill. App. 2d 444, 451 (1965).

Plaintiff's deposition clearly supports the trial court's judgment finding her guilty of contributory negligence. Defendant's motion was properly granted.

Judgment affirmed.

RECHENMACHER, P.J., DIXON, J., concur



*Johnson*

3D

30 I.A. 934



61016

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.	)	
	)	HON. FRANK WILSON,
MARK JONES,	)	Presiding
	)	
Petitioner-Appellant.	)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):  
Before Burke, P.J., Goldberg and Egan, JJ.

Mark Jones, hereinafter called petitioner, appeals from the dismissal, without an evidentiary hearing of his pro se and supplemental post-conviction petitions, filed pursuant to the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, pars. 122-1 et seq.). The sole issue on appeal is whether the trial court properly dismissed the petitions without an evidentiary hearing.

Petitioner and co-defendant, Joseph Cross, were found guilty of murder by a jury. Petitioner was sentenced to a term of not less than 75 years nor more than 100 years in the Illinois State Penitentiary. The sentence was affirmed upon direct appeal to this court. (People v. Jones, 12 Ill. App. 3d 643, 299 N.E.2d 77.) On June 27, 1973, petitioner filed a pro se petition for post-conviction relief. The Public Defender filed his appearance on July 12, 1973, and on July 23, 1974, filed a supplemental petition. The State filed a motion to dismiss the petitions. The motion was allowed without an evidentiary hearing. Notice of appeal was filed on August 20, 1974.

The State Appellate Defender was appointed to represent petitioner on this appeal and has filed a motion to withdraw, under Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396, supported by a brief, on the ground that the issues raised in the pro se petition and the supplemental petition filed by appointed counsel are without merit and that the appeal is frivolous.



Defendant was mailed copies of the motion and brief on April 16, 1975. He was informed that he had until June 26, 1975, to file any additional points he might choose in support of his appeal. He has not responded.

The pro se petition alleged that petitioner "was arrested for a crime of murder that he did not commit, that he was identified by some men who said that they saw a short man attacked [sic] the deceased, that he is not a short man, since his height is 5' 10" tall, and that he was identified while sitting in the Police's car, and not in a lineup of a showup"; that petitioner was "interrogated by the policemen without being advised of his Constitutional Rights to remaining silence [sic] and was threatened by the policemen when he refused to answer some of the questions asked him by the policemen"; and that the petitioner "was not given a fair and impartial trial". The pro se petition also alleged that court-appointed counsel was incompetent; that counsel "did waive the Constitutional Right of the petitioner of the confrontation of his accusers"; that petitioner was never consulted on the matter of waiving his rights and was never informed "of the possible consequences of any such waiver"; and that petitioner did not consent to such waiver.

The supplemental petition, filed by the Public Defender, alleged that the trial court, contrary to the provisions of the United States and Illinois Constitutions, did not properly protect petitioner's constitutional rights; that the Assistant State's Attorneys, who prosecuted the case, "failed to make reasonable and complete efforts to obtain the presence at trial of the witness, Leonard Mack"; that as a result of Mack's absence, "petitioner's right to confront his accusers was denied, when [Mack's] out-of-court statements were omitted [sic] against [petitioner] at trial"; that the trial court denied petitioner's motion "to increase the amount of funds available by statute to investigate the whereabouts of [Mack], and by so doing denied petitioner's right to confront the witnesses against him"; and that by reason of the





foregoing it "can be shown at a hearing" that the errors of the trial court have caused the petitioner "to be illegally convicted and confined".

The State Appellate Defender states that the allegations in the pro se petition, to the effect that petitioner's constitutional rights were substantially violated prior to and during the time of his trial, might be possible grounds for appeal. However, the law is clear that petitioner is not entitled to an evidentiary hearing as a matter of right, since the dismissal of a non-meritorious petition on motion is within the contemplation of the Post-Conviction Hearing Act and is necessary to the orderly and expeditious disposition of such petition. (People v. Collins, 39 Ill. 2d 286, 235 N.E.2d 570; People v. Funches, 9 Ill. App. 3d 372, 292 N.E.2d 187; People v. Payne, 16 Ill. App. 3d 83, 305 N.E.2d 700.) To be entitled to relief under the Post-Conviction Hearing Act, the petitioner must assert the substantial denial of a constitutional right. (People v. Newberry, 55 Ill. 2d 74, 302 N.E.2d 34; People v. Hysell, 48 Ill. 2d 522, 272 N.E.2d 38.) Where the petitioner alleges only legal conclusions, unsupported by affidavits which set forth factual allegations, dismissal without an evidentiary hearing is proper. (People v. Pierce, 48 Ill. 2d 48, 268 N.E.2d 373; People v. Morris, 43 Ill. 2d 124, 251 N.E.2d 202.) The allegation that petitioner's constitutional rights were violated is a mere conclusion of the pleader, unsupported by affidavit and, therefore, did not require an evidentiary hearing.

The State Appellate Defender also states that the allegations in the pro se petition to the effect (a) that petitioner did not commit the crime, (b) that the attacker was identified as a short man while petitioner is not short, and (c) that petitioner was not identified in a lineup but by eyewitnesses while sitting in a police car, might be a possible ground for appeal. The allegations that petitioner did not commit the crime and that the attacker was a short man while petitioner is not short, are allegations which



contend that petitioner was not proven guilty beyond a reasonable doubt. Such allegations do not raise a cognizable issue under the Post-Conviction Hearing Act. (People v. Vail, 46 Ill. 2d 589, 264 N.E.2d 201; People v. Frank, 48 Ill. 2d 500, 272 N.E.2d 25.) Further, on direct appeal the Appellate Court held (12 Ill. App. 3d 642, 647, 299 N.E.2d 77, 81) that the identification of the petitioner was established beyond a reasonable doubt and, therefore, this issue is res judicata. (People v. Ward, 48 Ill. 2d 117, 268 N.E.2d 692; People v. Smith, 22 Ill. App. 3d 661, 318 N.E.2d 350.) Also, the allegation that petitioner was identified while sitting in a police car "a short time" after the murder, rather than in a lineup, does not raise a constitutional issue. The "on the scene" identification was not unnecessarily suggestive and was necessary for rapid and effective apprehension of the offender. (People v. Elam, 50 Ill. 2d 214, 278 N.E.2d 76; People v. Young, 46 Ill. 2d 82, 263 N.E.2d 72; People v. Ellis, 24 Ill. App. 3d 870, 321 N.E.2d 722.) Further, the issue of suggestive identification was not raised on direct appeal and, therefore, is deemed waived. People v. James, 46 Ill. 2d 71, 263 N.E.2d 5.

The State Appellate Defender further states that the allegation that petitioner was interrogated by the police without informing him of his right to remain silent might be a possible ground for appeal. This issue was not raised on direct appeal. Issues not raised on direct appeal are deemed waived and not cognizable in a subsequent post-conviction proceeding. (People v. James, 46 Ill. 2d 71, 263 N.E.2d 5; People v. West, 43 Ill. 2d 219, 252 N.E.2d 529.) Further, the record does not disclose that improper interrogation techniques were used and no affidavits were filed to support this allegation. Post-conviction relief depends upon a "substantial showing" of violation of constitutional rights and, therefore, allegations must be supported by the record, affidavits or other corroborative material, unless the absence is sufficiently explained. People v. Evans, 37 Ill. 2d 27, 224 N.E.2d 778.



The State Appellate Defender also states that the allegation that petitioner was not given a fair and impartial trial might be a possible ground for appeal. However, this allegation is a mere conclusion of the petitioner, unsupported by affidavit and, therefore, could not be the basis for an evidentiary hearing. People v. Morris, 43 Ill. 2d 124, 251 N.E.2d 202.

The State Appellate Defender states that the allegation in the pro se petition that defense counsel was incompetent might also be a possible ground for appeal. Certain facts in the record, as discussed by this court on direct appeal (12 Ill. App. 3d 642, 648-651, 299 N.E.2d 77, 81-83), are the basis for this allegation. The State informed the trial court and defense counsel that it was unable to locate Leonard Mack and, therefore, he would not be called as a witness; and that the State did not intend to mention the fact that Mack had identified the petitioner. At the trial, the attorney for co-defendant Cross, who was aware that Mack had made some sort of identification at the scene, insisted upon cross-examining the police officers pertaining to that fact. This testimony implied that three persons, including Mack, had actually viewed the offense, while only two eyewitnesses testified. In order to impeach the police officers' testimony that there were three "eyewitnesses" rather than only two eyewitnesses, counsel for petitioner referred to a police report which indicated there were only two eyewitnesses. It was on the basis of the above actions by defense counsel that petitioner contended his trial counsel was incompetent. The circumstances pertaining to the interrogation of the police officers as to the statements of Mack were discussed in great detail by this court on direct appeal. The court concluded that defense counsel's motion for a mistrial was properly denied, saying

"Nolan further testified Mack told him two men came into his store and were just looking around. Later, Nolan was present when Mack identified the two defendants in the squad car as the men he had seen in his store. This testimony was



permitted over the objection of the attorney for Cross. That attorney examined Nolan again and brought out what Mack had told him and that Mack had identified the defendants in the squad car. He also brought out the fact that Mack had told the officer he did not see the occurrence. The defendants now contend that the testimony of the officers concerning the statement made by Mack was prejudicial error. We disagree. The record reflects the trial court's awareness of the problem and its gravity. He specifically warned all the parties to be careful in their questioning. Nonetheless, the attorney for Cross, who was aware that Mack had made some sort of identification at the scene, insisted upon cross-examining Bigelow and eliciting that fact. At that point, the attorney for Jones, who had initially urged the court to admonish the State not to go into Mack's statements, attempted to show that the officer was not telling the truth when he said that three men identified the defendants and, in doing so, again brought out the fact that Mack had identified them. All this testimony having been brought out by the defense despite the trial court's admonition, a motion for mistrial was made and, we hold, was properly denied."

12 Ill. App. 3d 642, 651, 299 N.E.2d 77, 83.

It should be noted that incompetency of defense counsel was not argued on direct appeal and, therefore, should now be barred by the doctrine of waiver. (People v. Hill, 44 Ill. 2d 299, 255 N.E.2d 377.) Further, the issue lacks merit. Defense counsel's elicitation of testimony regarding Mack's out-of-court identification of petitioner was motivated by proper tactic considerations. There were only two eyewitnesses to the offense, yet the jury had been informed by police officer Bigelow, in response to questioning by counsel for co-defendant Cross, that there were three, and that one was Leonard Mack. Counsel for petitioner's questions were aimed at establishing that Mack did not see the offense, and that there were only two eyewitnesses (12 Ill. App. 3d 642, 649-651, 299 N.E.2d 77, 81-83). These actions do not establish that defense counsel's level of representation was of such low caliber that the trial was reduced to a sham or a farce. (People v. Hawkins, 23 Ill. App. 3d 758, 320 N.E.2d 90.) At most, the action of defense counsel was merely trial strategy or an error of judgment which will not establish incompetency. (People v. Wesley,





30 Ill. 2d 131, 195 N.E.2d 708.) Therefore, the allegation that defense counsel was incompetent is without merit.

The State Appellate Defender also states that the allegation in the supplemental petition that the State failed to make reasonable and complete efforts to locate Leonard Mack as a witness might be a ground for appeal. It might also be argued that because Mack's out-of-court identification of petitioner was disclosed at trial by interrogation of the police officers, petitioner's right to confront his accusers was violated. These issues were argued and rejected on direct appeal and, therefore, are res judicata and not now reviewable under the Post-Conviction Hearing Act. (People v. Ward, 48 Ill. 2d 117, 268 N.E.2d 692.) Further, the State is not obligated to produce every witness to a crime. People v. King, 4 Ill. App. 3d 1066, 282 N.E.2d 746.

Finally, the State Appellate Defender states that the allegation contained in the supplemental petition to the effect that the trial court erred in denying defense counsel's motion to increase the amount of funds available by statute to investigate the whereabouts of Leonard Mack might be a possible ground for appeal. However, this allegation was unsupported by the record in the case or by accompanying affidavits and, therefore, its rejection by the trial court was not erroneous. People v. Evans, 37 Ill. 2d 27, 224 N.E.2d 778; People v. Stringfellow, 5 Ill. App. 3d 944, 284 N.E.2d 496.

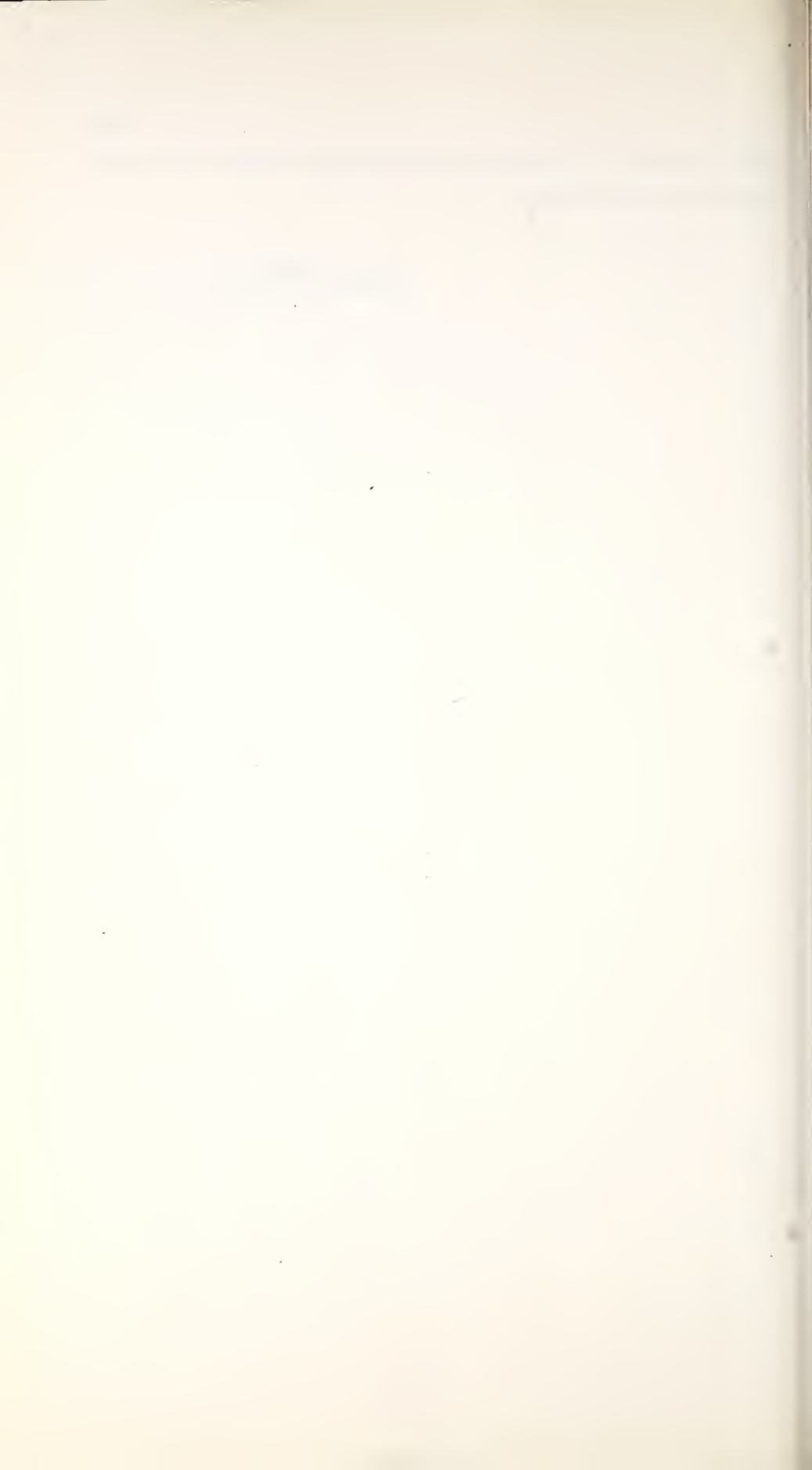
We have examined the record and brief and agree with the State Appellate Defender's conclusion. The issues raised by the petitioner are not meritorious and are frivolous. Further, our examination of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.

For the foregoing reasons, the motion of the State Appellate Defender of Cook County to withdraw as counsel on appeal is allowed



and the judgment of the circuit court of Cook County dismissing the petition is affirmed.

MOTION ALLOWED;  
JUDGMENT AFFIRMED.



30 I.A. 964<sup>3D</sup>

74-101

UNITED STATES OF AMERICA

State of Illinois       )  
Appellate Court       )   ss:  
Second District       )

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice

Honorable WALTER DIXON, Justice

Honorable THOMAS J. MORAN, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On August 15, 1975 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



No. 74-101

Abstract

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
SECOND DIVISION

FILED

MAY 11 1975

ROSE H. STOUT, Clerk  
Appellate Court, Second District

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. ) Appeal from the Circuit Court  
 ) for the 19th Judicial Circuit,  
CHAUNCEY HAGANS, ) Lake County, Illinois.  
 )  
Defendant-Appellant. )

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

The defendant was charged with robbery, pleaded guilty and was sentenced to not less than 3 nor more than 9 years in the penitentiary. He appeals his conviction and sentence on the grounds, (1) that he was not properly admonished under Supreme Court Rule 402 inasmuch as the court did not advise him of the mandatory parole term of 3 years in addition to his prison sentence automatically imposed for a conviction of robbery and (2) that the trial court denied the defendant a fair and impartial sentencing hearing when he considered evidence of prior arrests, not resulting in convictions.

In refutation of the defendant's first contention noted above the State's brief cites People v. Krantz, 58 Ill. 2d 187, which held that under Supreme Court Rule 402 it was not necessary to admonish the defendant concerning the automatic parole provision resulting from a conviction for robbery. However, that decision on the point of admonishment as to mandatory parole has recently been overruled by the Supreme Court's opinion in People v. Wills, 61 Ill. 2d 105, wherein the court said:





"We have reconsidered the position taken in People v. Krantz, 58 Ill. 2d 187, 195, and hold that compliance with Rule 402(a)(2) requires that a defendant be admonished that the mandatory period of parole pertaining to the offense is a part of the sentence that will be imposed and that he can be held subject to the jurisdiction of the Parole and Pardon Board for a period of time equal to the maximum term of imprisonment provided in the indeterminate sentence and the parole term. See Ill. Rev. Stat. 1973, ch. 38, par. 1003-3-10(a)." (61 Ill. 2d 109.)

In the case before us, however, the defendant's sentence was imposed in January, 1974, whereas the opinion in the Wills case was not rendered until May, 1975. In its supplemental opinion in Wills the Supreme Court specifically declared that the opinion was not, on the point of admonishment as to mandatory parole, to be given retroactive effect. Since the Wills decision is not to be given retroactive effect on the point here involved the admonishment to the defendant in the case before us was proper at the time it was given and the defendant's contention in that regard is not valid.

The defendant also contends he was not given a fair and impartial sentencing hearing because the judge considered evidence of two prior arrests of the defendant which had not been reduced to conviction. We are not certain from the defendant's brief whether he is contending that the actual sentence of imprisonment is excessive and reflects prejudice on the judge's part induced by the defendant's previous arrest record, or whether the defendant is implying that the injection of the arrest record induced the judge to deny probation. It is true, of course, that previous arrests without convictions should not be considered in pronouncing sentence. (People v. Jackson, 95 Ill. App. 2d 193; People v. Hampton, 5 Ill. App. 3d 220.) However,



this limitation does not apply to an application for probation.

People v. Taylor, 13 Ill. App. 3d 974.

In any event, the record in the case before us does not indicate that the trial judge was in any way influenced by the State's Attorney's disclosure of two previous arrests not reduced to conviction. It appears from the tenor of the judge's remarks just previous to pronouncing sentence that other considerations more strongly influenced his decision to deny probation. The defendant had not only had previous arrests but also had two previous convictions, and, in addition, his history showed a definite tendency to aggressive behavior as indicated by his disciplinary problems in his previous imprisonment. At the time of the present crime he was using drugs and since his employment record was spotty he had to support his habit by stealing. The defendant's record was very negative without considering the two previous arrests and it is unlikely they influenced the judge's consideration either as to the application for probation or the sentence imposed. We do not believe the defendant was prejudiced by the disclosure of the two arrests. People v. Mallory, 27 Ill. App. 3d 561.

The judgment of the trial court is affirmed.

Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.



3D  
30 I.A. 268

STATE OF ILLINOIS



75-64

APPELLATE COURT      THIRD DISTRICT  
OTTAWA

ple vs. Charles Wells

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-five, within and for the Third District  
of Illinois:

Present—      PC

HON. ALLAN L. STODER, Presiding Justice

HON. JAY J. ALLOY,      Justice

HON. RICHARD STENGEL,      Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
August 15, 1975 the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:



No. 75-64

In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1975.

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	Will County
	)	
CHARLES WELLS,	)	
	)	
Defendant-Appellant.	)	

PER CURIAM

Abstract

This is an appeal from a conviction of Charles Wells for armed robbery, and from a sentence thereon to a term of imprisonment of not less than 4 nor more than 10 years. The cause was tried by a jury.

On October 9, 1974, the Circuit Court of Will County appointed the State Appellate Defender to represent appellant Charles Wells on the appeal. The State Appellate Defender for the Third Judicial District informed appellant Charles Wells on July 31, 1975, that the Appellate Defender would file a motion for leave to withdraw and a brief in support thereof pursuant to the precedent of Anders v. California (1967), 388 U.S. 738. In the motion for leave to withdraw, the Appellate Defender asserts that an appeal in this cause would be wholly frivolous and without possibility of success.

Defendant Charles Wells was properly indicted by the Will County Grand Jury on a charge of armed robbery. Defendant was adequately and competently represented by the Public Defender during all of the trial proceedings. Prior to trial Wells moved for a psychiatric examination to determine his fitness to stand trial. The court granted the motion and appointed two psychiatrists to examine Wells. Both





psychiatrists found that he was slightly retarded but fit to stand trial. The competency hearing was held before the court after Wells waived his right to a jury trial on such issue. On the basis of the psychiatric reports, the court ruled that Wells was fit to stand trial. Fitness to stand trial need only be established by a preponderance of the evidence (People v. Williams (1st Dist., 1970), 131 Ill. App. 2d 507, 266 N.E.2d 145).

During the subsequent trial by jury, the evidence for the State disclosed that Wells robbed the proprietors of a Joliet grocery store at gunpoint of \$175 in currency and food stamps. He was apprehended by the police a short distance away only three minutes after the robbery. All three of the robbery victims, who had ample opportunity to observe Wells during the hold-up, identified him as the robber.

On behalf of Wells, the testimony of his mother and Wells was submitted. Mrs. Wells stated that defendant was a "slow learner". Wells testified in his own behalf and admitted that he committed the offense but stated that he was induced to do so by others. He also admitted that at the time of the offense he knew that committing the robbery was wrong.

At the close of the evidence, the trial court ruled that Wells had not presented sufficient evidence to overcome the presumption of sanity and relieved the State of the obligation of proving his sanity. The court also refused to instruct the jury on the defense of insanity and was correct in making such ruling. The evidence which tended to establish that defendant was mentally retarded was insufficient to warrant an instruction on the defense of insanity where there was no evidence that the mental defect made him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (People v. Turner (1973), 56 Ill. 2d 201, 306 N.E.2d 27). Wells himself had testified that he knew the robbery was wrong when he committed it and did not claim he was forced to conduct the hold-up of the store. No instruction on the defense of insanity therefore was warranted since there was no real evidence of



3D  
30 I.A. 1020



No. 61714

ROY DAVID CLAPK,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,	)	
	)	COURT OF COOK COUNTY.
v.	)	
	)	
VILLAGE OF WILLOW SPRINGS, a	)	HONORABLE
Municipal Corporation,	)	DONALD J. O'BRIEN,
	)	PRESIDING.
Defendant-Appellee.	)	

Before McGLOON, P.J., McNAMARA and MEJDA, JJ.

PER CURIAM:

Roy David Clark, plaintiff, filed an interlocutory appeal from the judgment order denying his motion for a preliminary injunction. The sole issue on appeal is whether the trial court erred in denying plaintiff's motion for a preliminary injunction.

Plaintiff filed a complaint for an injunction in which he alleged that he operated the Holiday Health Club at 8200 South Archer Road, Willow Springs, Illinois, pursuant to a license issued by the defendant, Village of Willow Springs. Plaintiff said he was arrested for allegedly operating the Club without a license, which had wrongfully been revoked under the purported provisions of Section 5-8-1 of the Municipal Code of Willow Springs; and that such section does not require a license for the operation of a health club. Plaintiff further alleged he was informed by the Chief of Police that he would be arrested for each and every day he was open for business at said Holiday Health Club, but argued that said arrest would be void and of no effect because of the lack of an ordinance regulating the business of plaintiff. Plaintiff further alleged that unless defendant was enjoined, plaintiff would suffer irreparable injury to his property and that he would be deprived of the lawful use of his premises contrary to the United States and Illinois Constitutions.

Defendant filed its answer in which it denied that plaintiff was maintaining and operating a health club on the premises but alleged that he maintained an obscene massage parlour which had



no cause or relation to any business known as a health club, but was solely for the sexual gratification of its patrons; that plaintiff advertised and solicited business for "a complete full body massage" from "lovely young ladies of your choice." Defendant alleged that by reason of the foregoing the license of plaintiff to operate a health club was revoked, after notice to plaintiff and after plaintiff failed to comply with said notice. Defendant further alleged that it had an ordinance in full force and effect providing for the issuance and payment of a license for a health club. Attached to the answer was a report in which the reporting officer stated that Laura Nicolosi, about 19 years of age, massaged the officer after which she removed his towel, put some type of oil on her hands and stated she would give him a "hand job."

Plaintiff filed a motion to strike the answer and alleged that Sections 5-8-1 to 5-8-7, as amended, of Chapter 8 of the Municipal Code of Willow Springs were void and of no effect because said ordinance was merely for revenue purposes and that a license fee cannot be exacted for the sole purpose of raising revenue.

The trial court entered an order denying plaintiff's motion to strike the answer and also his motion for a preliminary injunction. The order further granted plaintiff leave to file an amended complaint within five days and provided that there was no just cause for the delay of enforcement or appeal.

Plaintiff argues that the trial court erred in refusing to grant a preliminary injunction because Sections 5-8-1 to 5-8-7 of Chapter 8 of the Municipal Code of the Village of Willow Springs were a revenue measure and, therefore, void and of no force and effect. Defendant states that the issue "before the court at this time is whether the defendant, Village of Willow Springs, has a good and valid ordinance pertaining to a health club (massage parlour) and whether the Village of Willow Springs



has the power and authority for such a regulation and license." It would appear that both the parties have misconceived the issue on appeal. An attack on the constitutionality of a statute or ordinance will not be resolved upon application for a preliminary injunction. (Toushin v. City of Chicago (1974), 23 Ill. App.3d 797, 320 N.E.2d 202.) The record does not show that the question of the constitutionality of Sections 5-8-1 to 5-8-7 was decided by the trial court and on an interlocutory appeal this court will not decide this issue.

A motion for a preliminary injunction is addressed to the sound discretion of the trial court and, therefore, the role of an appellate court, when reviewing the grant or denial of an interlocutory decree, is restricted solely to a determination of whether the trial court correctly exercised its broad discretionary power. The substantive issues are not before this court for decision. It is not the purpose of a preliminary injunction to determine controverted rights or to decide the merits of the case. Frederick Chusid & Co. v. Collins Tuttle & Co. (1973), 10 Ill.App.3d 818, 295 N.E.2d 74.

In the case at bar, plaintiff filed a motion to strike defendant's answer. Accordingly, the well-pleaded factual allegations of the answer must be taken as true. (City of Chicago v. Geraci (June 27, 1975, No. 61497), --Ill.App.3d--.) Here, the answer alleged defendant licensed plaintiff to operate a health club, which plaintiff stated would be in the nature of the Chicago Health Club; that there would be exercise machines and persons would be able to exercise in an atmosphere of a health club; and that there would be no nude or obscene participation between the patrons and the employees of plaintiff; that plaintiff, in flagrant violation of such statements and agreements, advertised that plaintiff maintained a massage parlour for the sexual gratification of plaintiff's patrons and advertised that plaintiff's employees would be nude, thereby indicating and showing no relationship to plaintiff's





operation and a health club. Defendant further alleged that by reason of the foregoing the license issued to plaintiff to operate a health club was revoked.

In Toushin v. City of Chicago (1974), 23 Ill.App.3d 797, 320 N.E.2d 202, plaintiffs filed an interlocutory appeal from an order denying their motion for a preliminary injunction to permit them to operate a massage parlour without a license and to permit female employees to massage male patrons, which the City maintained was in violation of Chapter 152 of the Municipal Code of Chicago. The court held (23 Ill.App.3d, p. 803, 804) that the validity of Chapter 152 "should not be resolved upon application for a temporary injunction"; and that the trial court's finding that plaintiffs' massage parlour "was a public nuisance amenable to restraint constituted no abuse of discretion."

In view of the foregoing, the trial court did not abuse its discretionary power when it refused to issue a preliminary injunction and continued the matter for a hearing on the merits.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.



3D  
301.A. 1054



59926  
59927

PEOPLE OF THE STATE OF ILLINOIS, )	APPEAL FROM
)	CIRCUIT COURT
Plaintiff-Appellee, )	COOK COUNTY
)	
v. )	
)	
LEONEL LUGO and )	
LUCO PAVONE, )	HONORABLE
)	JAMES A. CONDON,
Defendants-Appellants.)	Presiding.

Before DEMPSEY, McGLOON, MEJDA, JJ.

PER CURIAM.

Defendants, Leonel Lugo and Lucio Pavone, were convicted, following a bench trial in the Circuit Court of Cook County, of the battery on July 13, 1973, of Joseph Klusacek (Ill. Rev. Stat. 1973, ch. 38, par.12-3). Lugo was sentenced to a term of three months in the House of Correction, to be served Saturdays and Sundays, and Pavone was sentenced to the House of Correction for a term of six months, to be served Sundays and Mondays. The only issue on appeal is whether the defendants knowingly and understandingly waived their right to trial by jury.

The report of proceedings for August 28, 1973, before Judge James A Condon, shows the following:

THE CLERK: Lugo and Pavone, Counsel.

MR. BAINBRIDGE: Plea of not guilty, jury waived, set for trial by this Court.

Bainbridge had filed a written appearance for the defendants. His conduct of the bench trial indicated that he was familiar with the defendants' theory of the case; namely, that the complainant was one of five or ten youths who had earlier "jumped"



the defendants, and that after the fight the defendants had chased the complainant to his house.

After trial and conviction on August 28, 1973, defendants obtained new counsel. On October 31, Bainbridge was given leave to withdraw, and on November 13, 1973, defendants' new counsel filed an amended motion for a new trial, contending that the defendants did not knowingly and understandingly waive their right to a jury trial. In the attached affidavits, both defendants stated that at no time prior to trial did counsel ever discuss with them their right to trial by jury, whether it ought to be waived or what the consequences of the waiver would be; that when Bainbridge told the court there would be a jury waiver on August 28, 1973, he did so "without the authority and consent of" the defendants. Significantly, the record contains no affidavit by Bainbridge. The motion was denied on November 20, 1973.

In the recent case of People v. Durham, \_\_\_\_ Ill. App.3d \_\_\_\_, \_\_\_\_ N.E. 2d \_\_\_\_ (Gen.No. 58824, decided October 11, 1974), the court reviewed at length the leading Illinois Supreme Court decision on jury waiver (People v. Sailor (1969), 43 Ill. 2d 256, 253 N.E. 2d 397), and the many subsequent Appellate Court decisions since Sailor. Therefore, we need not review them here. The teaching of Sailor is that an accused ordinarily speaks and acts through his attorney, and when one stands by silently while his attorney in his presence waives a jury in open court, he is deemed to have acquiesced in and is bound by this action. The Supreme Court



stated that the trial court is entitled to rely on the professional responsibility of the defendant's attorney, that when he informs the court he is waiving his client's right to a jury, the client has knowingly and understandingly consented to his doing so.

In the case before us, the only support for the argument that retained counsel did not advise the defendants of their right to a jury trial, comes from the affidavits of defendants attached to their motion for a new trial. The record contradicts these affidavits to the extent that the defendants remained silent in court when their attorney stated, "Jury waived." The record does not contain a report of proceedings for November 20, 1973, when the motion for new trial was denied. In view of the rule that errors may not be considered when they appear solely from an affidavit accompanying a motion for a new trial, there is nothing in the record to substantiate defendants' claim that they were denied their right to a jury trial. (See City of Chicago v. Quane (1968), 98 Ill.App. 2d 100, 240 N.E. 2d 150 (abst.); People v. Basile (1969), 112 Ill.App. 2d 108, 109, 251 N.E. 2d 277.) Therefore, the decision is governed by People v. Sailor, supra, since retained counsel did waive jury in the presence of both defendants. Accordingly, the judgments of the Circuit Court are affirmed.

Affirmed.





30 I.A. 1063



60602

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
VLADO GAZIC, )  
 )  
Defendant-Appellant.)

Appeal from the Circuit  
Court of Cook County.

Honorable Arthur L. Dunne,  
Judge Presiding.

BEFORE MCGLOON, P.J., and DEMPSEY and McNAMARA, JJ.

PER CURIAM:

Vlado Gazic, defendant, was found guilty of two counts of armed robbery, one count of rape and one count deviate sexual assault. He was sentenced to a term of 18 to 54 years on each charge, the sentences to run concurrently.

In December 1971, at approximately 7:00 P.M., the defendant and a companion entered the apartment of one of the complainants. The men were wearing gloves and were armed with guns. One held his weapon on the complainant while the other looked through her apartment. They instructed her to knock on the common door to an adjoining apartment. There was no response and they forced open the door and entered. A man named Baker and a woman were inside. The robbers bound Baker's hands and feet and took his money. They went through all the drawers and closets of both apartments, and removed money, jewelry and other valuables. After putting a pillow cover over Baker's head the intruders raped his friend and committed deviate sexual acts upon her. Before leaving the apartment, where they had been for about two hours, the robbers tied the hands and feet of both women.

The defendant was seen by Baker in August 1972. He was arrested and indentified by his victims. He admitted the crimes to the police and the State's attorney.



While the defendant argues several points for the reversal of his conviction, we believe it is only necessary to consider his contention that he was denied his constitutional right to be defended by an attorney of his own choosing.

When the defendant's case was called for trial on April 16, 1973, he appeared in court and was represented by his privately retained counsel, Thomas Maloney. Jury selection was concluded that day. On April 17th, when the case was called, Maloney informed the trial judge that his client had not come to court and his efforts to locate him by telephone had not proved fruitful. The defendant did not appear in the afternoon and the jury was dismissed until the following morning. On April 18th Maloney again informed the trial judge that the defendant had still failed to appear. Once more the jury was dismissed until the following morning.

On April 19, 1973, Maloney was accompanied by attorney Richard Devine. The defendant had still failed to personally appear and the trial judge ordered the trial to commence in his absence. Prior to the jury being excused for lunch, Maloney told the court that he had to take his wife to see her surgeon and that he would not be present at the afternoon session, but that Devine would represent the defendant. Maloney gave no explanation as to who Devine was or what connection he had to himself or to the defendant. When the case was called after the lunch break, Devine appeared on behalf of the absent defendant and the trial resumed. Thereafter, Devine conducted the trial.

A defendant has an absolute constitutional right to be represented by counsel of his own choice. People v. Walsh (1963) 28 Ill.2d 405, 192 N.E.2d 843. The defendant employed as his counsel, Thomas Maloney, who appeared with him on the first day of



trial. Thereafter, the defendant did not again appear at his own trial. By his voluntary absence while he was at liberty on bail he waived his constitutional right to be present and the trial court properly proceeded with the trial in his absence. People v. Colon (1973), 9 Ill.App.3d 989, 293 N.E.2d 468. However, his voluntary absence did not constitute a waiver of his constitutional right to appear by his privately retained counsel.

Attorney Maloney appeared in court with the defendant on April 16, 1973, and appeared for him on April 17th and April 18th when the cause was continued because of the defendant's absence. He also represented him on April 19, 1973, when the trial continued in the defendant's absence. In the morning session he was assisted by Attorney Devine, but he withdrew at the noon recess and never again appeared during the trial. Devine conducted the entire remaining trial; he cross-examined witnesses, entered into stipulations and made the closing argument.

The defendant asserts that Devine was not his attorney and that Devine's representing him without his authorization or consent violated his constitutional rights. The State argues that the defendant had in fact retained both Maloney and Devine as his counsel. The basis of the State's argument is that on the morning of April 19th, when the defendant was not present, Maloney several times stated "we" had attempted to contact the defendant on several occasions. The State urges that these statements made in Devine's presence indicate that Devine was involved in the case and was Maloney's co-counsel. However, the record does not bear out the State's contention.

The record shows that Maloney was the only attorney who filed an appearance on behalf of the defendant and he was also the only



attorney who personally appeared in court with the defendant. During the first day of trial when the defendant was present in the court room Devine neither appeared nor was his name in any manner mentioned. While a defendant can accept new counsel to represent him either by positive action or by acquiescence, neither of these situations exist in the case at bar. The record fails to indicate that defendant ever knew, met or talked to Devine or what Devine's relationship was to Maloney. The record is totally devoid of any indication that the defendant had employed or accepted Devine as his attorney. Under these circumstances, we conclude that he was denied representation by counsel of his own choice.

Our determination that this cause must be reversed and remanded for the above reason makes a determination of the majority of the other points raised in this appeal unnecessary since they will probably not reoccur at a future trial. However, we do deem it proper to consider two of the other points.

The defendant contends that his statements were improperly admitted into evidence since he was not properly warned of his constitutional rights pursuant to Miranda v. Arizona (1966), 384 U.S. 436. At trial, the arresting officer testified that he advised the defendant as follows:

"I advised him when we arrested him in the hallway of the courtroom; he had the right to remain silent; anything he did say would and could be used against him in the Court of Law;

"He had a right to consult with a lawyer; if he could not afford one, one would be appointed for him by the Court."

It is now urged that these warnings were insufficient and that they did not advise the defendant that he had a right to have counsel present at the interrogation.





In People v. Prim (1972), 53 Ill.2d 62, 289 N.E.2d 601, the defendant was convicted of armed robbery, attempt armed robbery and murder. The evidence adduced at the hearing on the motion to suppress his statement demonstrated that prior to giving a statement the defendant was advised that he had a right to remain silent, that he had a right to an attorney, that if he did not have any money for an attorney the State would provide one for him and that anything he said could and would be used against him in a court of law. The defendant replied that he understood his rights and thereafter gave a statement, but on appeal he argued that these warnings were defective in that he was not informed that he had a right to have an attorney present at the interrogation. In rejecting this argument the court stated:

"Miranda does not specify the precise language to be used in conveying the warnings....It would be a strained construction of the language used by the detective to say that it conveyed a meaning that an attorney would be furnished at some future time. All of the warnings related to the giving of the statement. One part thereof viewed by itself may be subject to a different interpretation but when viewed in the context of the entire discussion it can only refer to the right to have counsel provided for the defendant at the time of the interrogation."

In the case at bar, as in Prim, a reading of all the warnings given the defendant leads to the conclusion that they were sufficient to comply with the dictates of Miranda. Accordingly, his statement was properly admitted into evidence.

The defendant also argues that his identification was the result of an improperly suggestive pre-trial identification procedure and should have been suppressed. At trial, the defendant was identified by Baker and his female victims. Baker testified that nine months after the



occurrence he saw the defendant and recognized him as one of the men that had robbed him. After getting his license number, Baker contacted his father, a policeman, who obtained a picture of the defendant. The picture was viewed by Baker and one of the women both of whom identified the defendant. They subsequently viewed a lineup of five men and again identified him. The defendant now argues that the lineup was unnecessarily suggestive in that he was the only man wearing a jacket. An examination of the photographs of the lineup, which were made part of the record on appeal, fail to support this argument. All five men were of the same race, the approximate same age, the approximate height and wearing approximately the same clothing. While it is true that the defendant was the only man wearing a jacket it is also true that there was only one man wearing striped pants and there was also only one man wearing a white T shirt.

One of the complainants testified that between the date of the incident and the date of trial she did not see the defendant nor identify him. On the morning of trial she was shown a photograph of a lineup of five men and identified the defendant as the man who had robbed her. The defendant claims that the use of a photographic identification so late in the proceedings was not explained and led to an improperly suggestive identification. At trial the complainant testified that between the date of the robbery and assault and the date of trial she had moved to Florida and was brought back specifically for this trial. This explains why she did not view the lineup in which the defendant participated and was not shown photographs prior to the date of trial. Further, an individual photograph of the defendant was not shown to her; she viewed a photograph of the lineup in which the defendant had participated. Under these circumstances, her identification of the defendant by photograph was not improper.



In addition, the testimony at the trial demonstrated that all three witnesses had an ample opportunity to view the defendant during the crimes so as to enable them to fix his identity. Where an in-court identification of a defendant has an independent basis apart from an alleged tainted pre-trial confrontation it is admissible. People v. Fox (1971), 48 Ill.2d 239, 269 N.E.2d 720; People v. Cox (1974), 21 Ill.App.3d 728, 315 N.E.2d 615. Here, all three witnesses viewed the defendant for over two hours under adequate lighting. Under these circumstances, we conclude that the in-court identification of the defendant by all three witnesses had a basis independent of the allegedly tainted pre-trial confrontations and was therefore properly admitted into evidence.

The judgment of the Circuit Court of Cook County is reversed and the cause is remanded for a new trial.

Reversed and remanded.



30 I.A. 1063



60939

BEN F. PFEIFER, et al.,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiffs-Appellants,	)	OF COOK COUNTY.
	)	
v.	)	
	)	
ESTATE OF HARRY D. CROOKS,	)	
DECEASED, and GEORGE M. SUNDHEIM,	)	
Attorney for Estate.	)	HONORABLE
	)	ANTHONY J. KOGUT
Defendants-Appellees.	)	PRESIDING.

Mr. JUSTICE SIMON delivered the opinion of the court:

On June 19, 1974, plaintiff Benjamin F. Pfeifer filed a document in the probate division of the circuit court of Cook County entitled, "Petition to Reopen the Fraudulent Closing of Probate of Decedent's Estate and Will by its Executors, Rose V. Crooks and George M. Sundheim." The petition related to the estate of decedent Harry D. Crooks, who died in 1957. Plaintiff Pfeifer, who filed the complaint pro se, alleged that Harry D. Crooks was actually one Harry Ferris Crooks, and that the heirs of Harry Ferris Crooks should, therefore, share in the estate of decedent. He claimed to be representing the alleged heirs of the decedent as well as his own interests. So far as plaintiff Pfeifer was concerned, the petition alleged that he was not an heir of the decedent. Because plaintiff Pfeifer alleged he was not an heir of decedent and because he was not an attorney, the court dismissed the petition, and plaintiff Pfeifer appealed.

The estate and the attorney for the estate were named as defendants by plaintiff Pfeifer and they moved to dismiss the appeal on the grounds: (i) that Mr. Pfeifer expressly disavowed any interest in the defendant estate but stated as his purpose for prosecuting the action his desire to be declared a non-heir of decedent; (ii) since Mr. Pfeifer claimed that he was not an heir of decedent, he lacked an interest in the defendant estate and was legally





incapable of participating in any proceeding involving the estate; and (iii) that Mr. Pfeifer's attempt to represent the co-plaintiffs as alleged heirs of the estate constituted the unauthorized practice of law in violation of Ill. Rev. Stat. 1973, ch. 13, § 1. On November 6, 1974, this court granted the motion to dismiss the appeal as to the co-plaintiffs, but denied it as to plaintiff Pfeifer.

Plaintiff Pfeifer, by declaring in the pleadings he filed in the probate division that he was not an heir of decedent, Harry D. Crooks, has admitted he has no interest in the estate of said decedent. He, therefore, lacks standing to file the instant petition. In re Estate of Dukes (1969), 114 Ill. App. 2d 383, 252 N.E. 2d 684.

Although the court's order of November 6, 1974 dismissed the appeal as to plaintiffs other than plaintiff Pfeifer, he would not, in any event, since he is not an attorney, have the right to represent any of the co-plaintiffs or the alleged heirs of the decedent before this court or the circuit court. Ill. Rev. Stat. 1973, ch. 13, § 1.

The order dismissing the petition is, therefore, affirmed.

AFFIRMED.

BURKE, P.J. and EGAN, J. concur.

(Abstract only.)





60265

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	
v.	)	Court of Cook County.
	)	
LILLIAN JONES,	)	Honorable Marvin E. Aspen,
	)	Judge Presiding.
Defendant-Appellant.)	)	

BEFORE MCGLOON, PJ., DEMPSEY and McNAMARA, JJ.

PER CURIAM:

Lillian Jones, defendant, was charged with the offenses of criminal housing management, involuntary manslaughter and the violation of sections 2.18, 7(7) and 18 of the Child Care Act of 1969. In a bench trial the court, at the close of the State's case, dismissed the charges of criminal housing management and involuntary manslaughter. At the close of all the evidence the court found the defendant guilty of violating the Child Care Act of 1969, as charged in Counts 3 and 4 of the indictment, and sentenced her to one year in the Cook County Department of Corrections and fined her \$1,000 on each of the counts, the sentences to run consecutively.

On appeal the defendant contends that the trial court erred in denying her motion to dismiss Counts 3 and 4 for failure to state an offense, that the State failed to prove her guilty beyond a reasonable doubt and that the sentences were excessive.

In the early morning hours on February 1, 1972, a fire occurred at 6023 S. Aberdeen, Chicago, in a building owned by the defendant. Six children, who lived in the basement, died as a result of the fire.



Seventeen witnesses testified for the State. Much of their testimony pertained to the charges of criminal housing management (section 12-5.1 of the Criminal Code) and involuntary manslaughter (section 9-3 of the Criminal Code). As these charges were dismissed by the trial court, the facts pertaining to them will not be reviewed. The facts pertinent to Counts 3 and 4 of the indictment [that the defendant knowingly operated, controlled and maintained a child care facility for more than six children on a day and night basis, when her license was for a maximum of six children and for only daytime care] will be discussed later in this opinion.

The defendant contends that Counts 3 and 4 of the indictment are fatally defective in that they do not set forth offenses under the Child Care Act of 1969. Section 2.18 of the Act (Ill.Rev.Stat., 1971, ch. 23, par. 2212.18) provides, in part, that:

"'Day care homes' means family homes which receive not more than 8 children for care during the day."

It is the defendant's position that section 2.18 provides for a "day care home"; that she was "charged with operating, controlling and maintaining a facility for child care, not a day care home"; and that "these homes are not synonymous." However, she has misconstrued the language of the indictment and the statute. The indictment provides "that Lillian Jones was authorized by the Department of Children and Family Services to operate, control and maintain a facility for child care during the day, whereas Lillian Jones did operate, control and maintain a facility for child care during the day and night." (Emphasis added.) It is therefore apparent that



section 2.18, which provides for care of not more than eight children during the day and the indictment, couched in the language of the statute, which alleged that defendant was authorized to maintain "a facility for child care during the day while she maintained a facility for child care during the day and night" are not inconsistent. The indictment was sufficient to allege an offense under the Act.

The requisites for determination of the sufficiency of an indictment are set forth in section 111-3 of the Criminal Code (Ill.Rev.Stat., 1971, ch. 38, par. 111-3). In People v. Harvey (1973), 53 Ill.2d 585, 294 N.E.2d 269, the court said (53 Ill.2d, p. 588):

"The requisites for determination of the sufficiency of an indictment are enunciated in the Code of Criminal Procedure. (Ill.Rev.Stat., 1969, ch. 38, par. 111-3). As we have held, the indictment must be such as to inform the accused of the nature of the charge, thus allowing him to prepare a defense and to serve as a bar to a future prosecution for the same offense. (People v. Ross, 41 Ill.2d 445, 448; People ex rel Miller v. Pate, 42 Ill.2d 283, 285, and cases cited therein.) An indictment which is phrased in terms of the statutory offense may be valid if the words 'so far particularize the offense that by their use alone an accused is apprised with reasonable certainty of the precise offense with which he or she is charged.' People v. Patrick, 38 Ill.2d 255, 258."

An indictment is to be read as a whole and where, as here, the statute is cited in the indictment, the statute and the charge are to be read together. People v. Baez (1974), 20 Ill.App.3d 896, 899, 314 N.E.2d 258. It has also been held that the determination of whether a defendant has been sufficiently informed of the exact crime with which he is charged is determined not by the technicalities of the language used but rather by the substance of the charge. People v.





Mahle (1974), 57 Ill.2d 279, 312 N.E.2d 267. Count 3 states that Mrs. Jones operated the facility for child care both day and night whereas she was authorized to operate a facility for child care only during the day. Count 4 charges that she was authorized to operate a facility for six children whereas she operated a facility for ten children. These counts, which are couched in statutory terms, are sufficient to provide her with adequate information to prepare her defense and would operate to bar a subsequent prosecution. People v. Harvey (1973), 53 Ill.2d 585, 588, 294 N.E.2d 269.

The next argument of the defendant is that the judgments should be reversed because the evidence failed to prove her guilty beyond a reasonable doubt of "knowingly operating, controlling and maintaining a facility for child care in violation of certain statutes and regulations." A review of the record reveals that her argument is not well founded. She testified that she had been caring for children since 1957 and that she so advised Gail Warshauer, an employee of the Illinois Department of Children and Family Services, when Ms. Warshauer questioned her concerning her desire to be licensed to care for children. She stated she talked to Ms. Warshauer on at least four or five different occasions; that during their conversations Ms. Warshauer questioned her concerning her family life, her religion and the different organizations with which she had worked; and that Ms. Warshauer informed her that her entire family would need medical examinations in order to be licensed.

The defendant further testified she informed Ms. Warshauer that she was caring for ten children or more both day and night but that Ms. Warshauer never asked her where she was keeping the children, where the children slept or where they were at the time of



Ms. Warshauer's interview. She said Ms. Warshauer never told her what type of license she would get, nor explained to her the term "child care home." The defendant, who had completed high school and a semester and a half of college, read the license. It clearly provided for the day care of six children. She said she complained about the limitation but that Ms. Warshauer said the number would be taken care of later by review. The defendant also said Ms. Warshauer did not give her the rules and regulations relating to the minimum standards for a care home facility.

Gail Warshauer testified that as a social worker her primary duty was to investigate applicants for day care licenses and to explain the program to them. She contacted Mrs. Jones in March 1971 and asked her if she would like to be licensed for child care. Mrs. Jones was agreeable and Ms. Warshauer gave her an application for a license. Ms. Warshauer said she explained to her that everyone in the home would have to have a medical examination; that the home had to meet certain standards; and that the license would be for an independent day care home. Ms. Warshauer told her the maximum number of children allowed by the department was eight, but that figure could vary upon how capable a woman was and how much space she had in her home; and that the license would be good from approximately 6:30 A.M. to 7:00 P.M. Ms. Warshauer testified she examined the second floor apartment where the defendant lived but did not examine the basement; and that during her conversation with the defendant it was never mentioned that the basement would be used in connection with her license. Ms. Warshauer further stated she was not sure if she mailed a copy of the standards governing the licensing of day care homes to the defendant or whether



she personally delivered it to her. Ms. Warshauer also stated she was not sure whether a copy of the standards was left with the defendant but usually when a person is licensed she is given information about the agency and the standards. Ms. Warshauer said her only function and capacity at the agency was the licensing of day care homes; that she explained to the defendant the purpose of the license; and that the defendant stated she wanted the license.

Ms. Warshauer further testified that the defendant wrote the word "both" in addition to checking the words "day care" and "day and night," but she informed her she could not have a license for both day and night care; that the defendant filled out the application when Ms. Warshauer was not present and that the handwriting on the application is the defendant's not Ms. Warshauer's.

Darlene Jones, who had been confined in the Manteno State Hospital, testified she was employed by the defendant to take care of the children and lived with them in the basement of the premises at 6023 Aberdeen, Chicago; and that on the night of the fire there were ten children and herself staying in the basement.

Raphael Cooke, eight years old, after being interrogated as to his competency to testify, said that before the fire there were ten to twelve children living in the basement; that all of them slept and ate their meals in the basement, and that neither he nor the other children ever slept on the second floor of the house.

Sue Johnson, who lost a child in the fire, testified that she had been in the basement about 20 or 25 times; and that she saw Darlene Jones, a helper, taking care of seven or eight children in the basement.



Joan Adams, who lost a child and a grandchild in the fire, testified that prior to the fire she was told the children would sleep upstairs in the defendant's apartment.

Joan Stewart testified that she had been in the basement at 6023 South Aberdeen and saw between 18 and 20 little children there; that the older children were dressed but the babies were in diapers and undershirts, were dirty and running around; and that after she had a conversation with Darlene Jones, the helper, she took her two children, who stayed there from Monday through Friday, away from the premises.

From the foregoing, it is apparent there was sufficient evidence for the trial court to find that the defendant knowingly operated, controlled and maintained a child care facility for more than six children on a day and night basis (when her license was for a maximum of six children and only for daytime care) in violation of the Child Care Act of 1969.

The trial judge, in the written "Judgment of Sentence" said:

"The defendant was found guilty of lodging and caring for children on the twenty-four hour basis, when her license provided solely for daytime care. She was found guilty of caring for ten or more children, when she was licensed to care for only six children. The facts brought out at trial clearly show in addition that the defendant led officials in the Department of Children and Family Services to believe that she would personally care for these children in her immaculate second floor apartment at 6023 South Aberdeen; whereas, in fact, she delegated the care of the children to a mentally deficient person in the spartan conditions of defendant's apparently less than immaculate basement."

The record presents a question of the credibility of the witnesses. In a bench trial it is for the trial judge to determine





the credibility of the witnesses and the weight to be given their testimony and, unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial court will not be disturbed. People v. Catlett (1971), 48 Ill.2d 46, 268 N.E.2d 378; People v. Arndt (1972), 50 Ill.2d 390, 280 N.E.2d 230; People v. Spriggs (1974), 20 Ill.App.3d 804, 314 N.E.2d 573. On appeal, the determination of the trial judge, who has the opportunity to view the witnesses and hear their testimony will not be lightly set aside. People v. McGhee (1974), 20 Ill.App.3d 915, 314 N.E.2d 313; People v. McNeal (1972), 8 Ill.App.3d 109, 289 N.E.2d 193; People v. Enright (1971), 1 Ill.App.3d 654, 275 N.E.2d 294. Here, the trial judge found the testimony of the State's witnesses believable and accepted their version of the violations of the provisions of the Child Care Act of 1969. In light of the record, it was not error for the trial judge to find that the defendant was guilty beyond a reasonable doubt.

The defendant also argues that the sentence to one year in the Cook County Department of Corrections and the fine of \$1,000 as to each of the two counts, with the sentences to run consecutively, was excessive and should be reduced because her "character was good, her past record was nil."

Before pronouncing sentence, the trial judge stated that in making his determination of the sentences, he was taking into consideration the fact that the defendant had no prior criminal record, the possibility of rehabilitation, the deterrent effect of the sentence and the facts and circumstances of the offense. After considering these factors, the trial judge stated:



"It is hard to imagine a more aggravated licensing violation situation than the present case--involving six deaths which would not have occurred, but for the violation. If this court does not enter the maximum penalty authorized for these violations by the Legislature, there conceivably could be no factual situation justifying the severest penalties, thus making a mockery of the legislative minimum and maximum range of sentencing."

While this court has the authority to reduce the sentences, this authority must be exercised with considerable caution and circumspection. People v. Fox (1971), 48 Ill.2d 239, 251-252, 269 N.E.2d 720; People v. Taylor (1965), 33 Ill.2d 417, 211 N.E.2d 673. The imposition of sentences is within the discretion of the trial court and courts of review will not interfere with that discretion unless it is manifested that the sentence is excessive. People v. Kendricks (1972), 4 Ill.App.3d 1029, 283 N.E.2d 273. Here, considering the nature of the offenses and the facts of the case, the sentences imposed were not excessive.

Although not argued by the defendant, we note that her sentences violate the provisions of the Unified Code of Corrections. Section 18(7) of the Child Care Code of 1969 (Ill.Rev.Stat., 1971, ch. 23, par. 2228), which was in effect at the time of the commission of the crime, provides that any person who violates the provisions of the Act [with certain exceptions not pertinent to this case] shall be guilty of a misdemeanor and shall be fined not less than \$100 or more than \$1,000 or be imprisoned in a penal institution other than the penitentiary not longer than one year, or both. However, the Unified Code of Corrections, which was in effect at the time the defendant was sentenced, provides that any person who violates section 18 of the Child Care Code of 1969 shall be guilty of a Class A



misdemeanor. The trial court found the defendant guilty of a Class A misdemeanor. Section 5-8-3 of the Unified Code of Corrections (Ill.Rev.Stat., 1973, ch. 38, par. 1005-8-3) provides that the penalty for a Class A misdemeanor shall be imprisonment for a term of less than one year. Section 5-9-1 of the Code (Ill.Rev.Stat., 1973, ch. 38, par. 1005-9-1) provides for a fine not to exceed \$1,000 for a violation of a Class A misdemeanor. Since the Unified Code of Corrections provides that the penalty for a Class A misdemeanor shall be imprisonment for a term of less than one year, the sentences must be modified by the reduction of one day. People v. Johnson (1973), 15 Ill.App.3d 741, 305 N.E.2d 208.

In light of the foregoing, each of the sentences are modified by the reduction of one day, and, as so modified the judgments are affirmed.

Affirmed as modified.

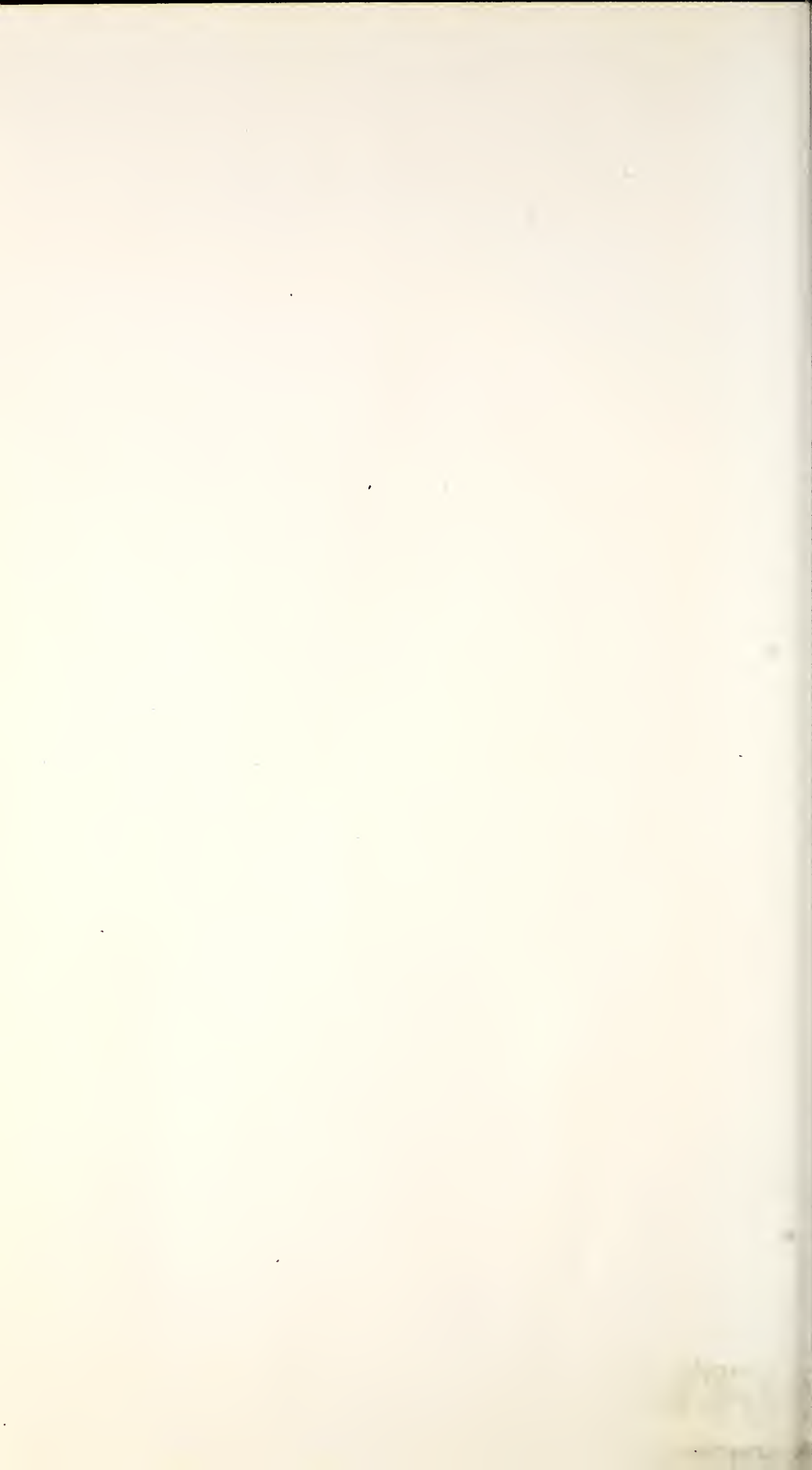












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